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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. WW-10-1099-JuMkH
	)	
MICHAEL R. MASTRO,	)	Bk. No. 09-16841
	)	
Debtor.	)	Adv. No. 09-01577
	)	
<hr style="width: 100%;"/>	)	
MICHAEL K. MASTRO; MICHAEL K.	)	
MASTRO LLC; MICHAEL K.	)	
MASTRO II, LLC; MICHAEL K.	)	
MASTRO III, LLC,	)	
	)	
Appellants,	)	
	)	
v.	)	M E M O R A N D U M*
	)	
JAMES F. RIGBY, JR., Chapter 7	)	
Trustee,	)	
	)	
Appellee.	)	
	)	
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Argued and Submitted on January 21, 2011  
at Seattle, Washington

Filed - March 1, 2011

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Appearances: Donald A. Bailey, Esq., Shafer & Bailey LLP  
argued for Appellants Michael K. Mastro,  
Michael K. Mastro LLC, Michael K. Mastro II, LLC,  
Michael K. Mastro III, LLC  
Daniel W. Ferm, Esq., Williams, Kastner & Gibbs  
PLLC argued for Appellee James F. Rigby

Before: JURY, MARKELL, and HOLLOWELL, Bankruptcy Judges.

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\* 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 Appellants Michael K. Mastro ("MKM"), Michael K. Mastro,  
2 LLC, Michael K. Mastro II, LLC and Michael K. Mastro III, LLC  
3 (collectively, "MKM LLC") appeal from the bankruptcy court's  
4 judgment granting summary judgment for the chapter 7<sup>1</sup> trustee,  
5 James F. Rigby, in an avoidance proceeding under § 549(a).<sup>2</sup>

6 Having considered the parties' briefs, all matters of  
7 record, and applicable legal authorities, we AFFIRM the  
8 bankruptcy court's decision on the avoidability of the  
9 transfers to MKM and MKM LLC. However, we conclude that the  
10 summary judgment record does not show uncontested facts  
11 regarding MKM's joint and several liability under § 550(a) for  
12 the transfers made to MKM LLC. Accordingly, we REVERSE the  
13 bankruptcy court's decision to hold MKM liable for the transfers  
14 made to MKM LLC.

#### 15 I. FACTS

16 Debtor Michael R. Mastro owned Mastro Properties, a real  
17 estate development and investment business, which he operated as  
18 a sole proprietorship. MKM is debtor's son and the sole member  
19 of the three defendant-appellant LLCs bearing his name. The  
20 three MKM LLCs are Washington limited liability companies formed  
21 for the purpose of holding policies of insurance on debtor's  
22

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23  
24 <sup>1</sup> Unless otherwise indicated, all chapter, section and  
25 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
26 1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
27 1001-9037.

28 <sup>2</sup> The trustee alleged claims for relief under §§ 549,  
548, 547, 544 and Wash. Rev. Code § 19.40 (Washington's version  
of the Uniform Fraudulent Transfer Act). The summary judgment on  
appeal concerns only the § 549 claim for relief.

1 life as part of his estate plan.

2 All transactions relating to MKM LLC were run through  
3 Mastro Properties' accounting system as if MKM LLC was a part of  
4 Mastro Properties. Accounting entries reflected deposits to  
5 Mastro Properties credited to MKM LLC and payments debited from  
6 MKM LLC. This practice continued until June 5, 2009, at which  
7 time MKM LLC established its own bank account with another bank.  
8 MKM LLC's new bank account was funded with an opening deposit of  
9 \$900,000 in insurance proceeds.<sup>3</sup>

10 On July 10, 2009, an involuntary chapter 7 petition was  
11 filed against debtor by three of his secured creditors. Debtor  
12 consented to the petition on August 20, 2009. The Order for  
13 Relief and Judgment Granting Petition for Involuntary Chapter 7  
14 was entered on August 21, 2009 and Rigby was appointed the  
15 chapter 7 trustee on the same day.

16 During the period between the filing of the petition and  
17 the Order for Relief, referred to as the gap period,<sup>4</sup> Mastro  
18 Properties issued three checks totaling \$340,000 to MKM LLC on  
19 July 31, August 5 and August 6, 2009 (collectively, the

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20  
21 <sup>3</sup> The trustee did not file a separate statement of  
22 uncontroverted facts with his summary judgment motion, a  
23 requirement under Bankr. W.D. Wash. R. 7056-1(b). Appellants did  
24 not object to this procedural shortcoming on appeal, nor shall we  
25 address it, as any objection is waived. Defendants' Statement of  
Genuine Issues Of Material Fact, which is part of the record on  
appeal, does not contest these facts. Accordingly, we assume  
that these facts are undisputed.

26 <sup>4</sup> Hamilton v. Lumsden (In re Geothermal Ress. Int'l,  
27 Inc.), 93 F.3d 648, 651 n.1 (9th Cir. 1996) ("The period between  
28 the filing of the involuntary petition and entry of the order for  
relief is known as the 'gap period.'"). Here, the gap period was  
July 10, 2009 through August 21, 2009.

1 "\$340,000 transfer"). MKM LLC used some of the money to start a  
2 new company, HAR Construction, which funded a new payroll system  
3 to pay former employees of Mastro Properties.

4 Also during the gap period, Mastro Properties issued three  
5 checks totaling \$22,000 directly to MKM on July 31, 2009 (the  
6 "\$22,000 transfer").

7 In December 2009, the trustee filed a complaint against MKM  
8 and MKM LLC<sup>5</sup> alleging a claim for relief under § 549 – among  
9 others – seeking to avoid the six unauthorized postpetition  
10 transfers which debtor made to MKM or MKM LLC during the gap  
11 period.

12 The trustee moved for summary judgment. In his motion, the  
13 trustee argued that he was entitled to judgment as a matter of  
14 law because there were no genuine and disputed issues of  
15 material fact for the avoidability of the gap period transfers  
16 under § 549(a) or (b). The trustee submitted the declaration of  
17 Kent Mordy, the financial advisor and accountant for the  
18 trustee, and the declaration of Scott B. Henrie, the attorney  
19 for the trustee, along with various exhibits in support of the  
20 motion.

21 MKM opposed, asserting that the \$22,000 transfer fell  
22 within the safe harbor of § 549(b) because it was for services  
23 performed by MKM during the gap period and represented the  
24 amount of his regular monthly salary. MKM also argued that the

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25  
26 <sup>5</sup> The trustee stated that it was unclear whether the  
27 reference to "MKM LLC" in the Mastro Properties Matrix Accounting  
28 System was to one, or more, of the three defendant LLCs.  
Therefore, the trustee sought relief against all three defendant  
LLCs.

1 \$340,000 transfer to MKM LLC was not property of the estate or,  
2 alternatively, fell within the scope of § 549(b) because value  
3 was exchanged for the transfer. In support of his argument, MKM  
4 submitted his own declaration and that of Tom Kenyon, the chief  
5 financial officer at Mastro Properties. Finally, MKM argued  
6 that he should not be held jointly and severally liable with  
7 MKM LLC for the \$340,000 transfer because he was not a person  
8 "for whose benefit the transfer was made" within the meaning of  
9 § 550(a)(1).

10 After hearing the parties' argument, the bankruptcy court  
11 ruled orally from the bench and granted summary judgment for  
12 the trustee on all issues by order entered March 5, 2010. The  
13 judgment did not recite or indicate the legal analysis delivered  
14 at the hearing. The judgment contained a certification under  
15 Fed. R. Civ. P. 54(b) incorporated by Rule 7054, making it final  
16 for appeal.

17 Appellants timely appealed.

## 18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction over this proceeding  
20 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (E). We have  
21 jurisdiction under 28 U.S.C. § 158.

## 22 **III. ISSUES**

23 Did the bankruptcy court err in granting the trustee's  
24 motion for summary judgment and concluding as a matter of law  
25 that:

26 A. Debtor's \$22,000 transfer to MKM and \$340,000 transfer  
27 to MKM LLC were avoidable under § 549(a); and

28 B. MKM was jointly and severally liable with MKM LLC for

1 the \$340,000 transfer under § 550(a).

#### 2 IV. STANDARD OF REVIEW

3 We review de novo the bankruptcy court's grant of a motion  
4 for summary judgment. Danning v. Miller (In re Bullion Reserve  
5 of N. Am.), 922 F.2d 544, 546 (9th Cir. 1991).

#### 6 V. DISCUSSION

##### 7 A. Summary Judgment Standards

8 In reviewing the bankruptcy court's decision on a motion  
9 for summary judgment, we apply the same standards as the  
10 bankruptcy court. Summary judgment is properly granted when no  
11 genuine and disputed issues of material fact remain, and, when  
12 viewing the evidence most favorably to the non-moving party, the  
13 movant is entitled to prevail as a matter of law. Fed. R. Civ.  
14 P. 56, incorporated by Rule 7056; Celotex Corp. v. Catrett,  
15 477 U.S. 317, 322-23 (1986). Material facts which would  
16 preclude entry of summary judgment are those which, under  
17 applicable substantive law, could affect the outcome of the  
18 case. The substantive law will identify which facts are  
19 material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
20 (1986).

21 The moving party bears the initial burden of showing that  
22 there is no material factual dispute. When the moving party  
23 does not bear the burden of proof on an issue at trial, "the  
24 moving party may discharge its burden of production by either of  
25 two methods." Nissan Fire & Marine Ins. Co., Ltd., v. Fritz  
26 Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). "The moving  
27 party may produce affirmative evidence negating an essential  
28 element of the nonmoving party's case, or, after suitable

1 discovery, the moving party may show that the nonmoving party  
2 does not have enough evidence of an essential element of its  
3 claim or defense to carry its ultimate burden of persuasion at  
4 trial." Id. If the moving party meets its initial burden, the  
5 burden then shifts to the non-moving party to set out, by  
6 affidavits or admissible discovery material, specific facts  
7 showing a genuine issue for trial. Fed. R. Civ. P. 56(e)(2).

8 "A trial court can [ ] consider [only] admissible evidence  
9 in ruling on a motion for summary judgment." Orr v. Bank of  
10 Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002). Moreover, we  
11 regard as true the non-moving party's evidence, if supported by  
12 affidavits or other evidentiary material. Celotex, 477 U.S. at  
13 324.

14 **B. The Trustee's Prima Facie Case Under § 549(a) And "Exchange**  
15 **For Value" Defense Under § 549(b): Burden of Proof**

16 Section 549(a) authorizes the trustee to avoid a transfer  
17 of estate property that occurs after the commencement of the  
18 case. The trustee's prima facie case requires proof of (1) a  
19 transfer (2) of estate property; (3) that occurred after the  
20 commencement of the case; and (4) that was not authorized by  
21 statute or the court.<sup>6</sup>

22 The trustee's avoidance power under § 549(a) is limited by  
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24 <sup>6</sup> Section 549)(a) states in relevant part:

25 Except as provided in subsection (b) or (c) of this  
26 section, the trustee may avoid a transfer of property  
of the estate –

27 (1) that occurs after the commencement of the case; and  
28 (2)(A) . . . ; or (B) that is not authorized under this  
title or by the court.

1 subsection (b) which provides that in an involuntary case, gap  
2 period transfers are not avoidable to the extent value is given  
3 after the commencement of the case.<sup>7</sup> "The purpose of the  
4 [§ 549(b)] exception is to allow a business to continue normal  
5 operations while an involuntary petition is pending." Yancy v.  
6 Varner (In re Pucci Shoes, Inc.), 120 F.3d 38, 40 (4th Cir.  
7 1997). However, the exception is a narrow one. Id.; Cossitt v.  
8 First Am. State Bank (In re Fort Dodge Creamery Co.), 121 B.R.  
9 831, 834 (Bankr. N.D. Iowa 1990).

10 MKM asserts a defense under § 549(b) with respect to all  
11 transfers. Rule 6001 provides: "[a]ny entity asserting the  
12 validity of a transfer under § 549 of the Code shall have the  
13 burden of proof." Thus, appellants would have the ultimate  
14 burden of proof at trial to show the transfers were valid under  
15 § 549(b).

16 **C. Summary Judgment As To The \$22,000 Transfer**

17 MKM concedes that the trustee met his initial summary  
18 judgment burden by proving his prima facie case under § 549(a)  
19 for avoidance of the \$22,000 transfer. However, he contends the  
20 transfer is protected under § 549(b) because he gave "value" by  
21

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22 <sup>7</sup> Section 549(b) provides:

23  
24 In an involuntary case, the trustee may not avoid under  
25 subsection (a) of this section a transfer made after  
26 the commencement of such case but before the order for  
27 relief to the extent any value, including services, but  
28 not including satisfaction or securing of a debt that  
arose before the commencement of the case, is given  
after the commencement of the case in exchange for such  
transfer, notwithstanding any notice or knowledge of  
the case that the transferee has.



1 providing "services" to debtor during the gap period. Section  
2 549(b) explicitly includes "services" within its definition of  
3 "value." To prove his exchange for value defense under  
4 § 549(b), MKM must provide evidence of services performed and  
5 facts from which to measure the reasonable value of those  
6 services. Geothermal, 93 F.3d at 651-52. Proof of either  
7 element necessarily requires some description of the services  
8 performed that allowed Mastro Properties to continue "normal  
9 operations" during the gap period. See Pucci Shoes, 120 F.3d at  
10 40.

11 To address the essential elements of MKM's defense, the  
12 trustee submitted evidence that MKM was never treated as an  
13 employee of Mastro Properties and thus never received a salary;  
14 i.e., he was not included in Mastro Properties' employee payroll  
15 system nor did Mastro Properties pay or withhold taxes on  
16 payments made to MKM. Moreover, the trustee submitted copies  
17 of MKM's tax returns which showed that MKM did not report income  
18 in the form of a salary.<sup>8</sup> MKM concedes that he never received a  
19 W-2 from Mastro Properties, but argues that this fact is  
20 irrelevant for purposes of his § 549(b) defense.

21 However, MKM's relevance argument overlooks that the  
22 trustee's evidence flatly contradicts MKM's declaration that the  
23 \$22,000 represented his "monthly salary" for the past five

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24  
25 <sup>8</sup> MKM argues in his opening brief that the trustee  
26 submitted incomplete copies of federal tax returns for MKM from  
27 2004 through 2007 in his reply documents. Nowhere does MKM  
28 explain why the tax returns are incomplete nor can we discern  
that he ever raised an evidentiary objection to the tax returns  
in the bankruptcy court because we do not have a transcript of  
that proceeding.

1 years. Moreover, the inference is that the \$22,000 monthly  
2 amount was a "draw" which represented profits or anticipated  
3 profits and not the reasonable cost of MKM's services. Even so,  
4 as explained below, nothing in MKM's declaration gave rise to a  
5 genuine issue of material fact on the essential elements of his  
6 defense.

7 MKM had the burden to identify evidence that precluded  
8 summary judgment. Fed. R. Civ. P. 56(e), entitled "Affidavits;  
9 Further Testimony" states in relevant part:

10 (2) Opposing Party's Obligation to Respond. When a  
11 motion for summary judgment is properly made and  
12 supported, an opposing party may not rely merely on  
13 allegations or denials in its own pleading; rather,  
14 its response must - by affidavits or as otherwise  
provided in this rule - set out specific facts showing  
a genuine issue for trial. If the opposing party does  
not so respond, summary judgment should, if  
appropriate, be entered against that party.

15 To prove that he performed services, the only "evidence"  
16 MKM points to is his own declaration which contains a single  
17 conclusory self-serving statement that "[t]he \$22,000 was for  
18 services I performed for the Debtor during the Gap Period."  
19 The declaration provides no further factual details or  
20 evidentiary support regarding what those services consisted of  
21 or how they allowed Mastro Properties to continue its normal  
22 operations during the gap period.

23 Moreover, nowhere in the record do we find evidence where  
24 MKM supported the "value" he provided to Mastro Properties.  
25 Instead, MKM again offers only his conclusory self-serving  
26 statements: "[t]he \$22,000 was my regular monthly salary from  
27 the Debtor for approximately five years prior to the Gap Period  
28 . . . . The \$22,000 payment was a fair value for my services."

1 MKM's conclusory statements are not "evidence" that he performed  
2 services or that the \$22,000 transfer was the reasonable cost  
3 for his services. For this reason, MKM failed to raise a  
4 genuine issue of fact for trial through his declaration. See  
5 FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir.  
6 1997) ("A conclusory, self-serving affidavit, lacking detailed  
7 facts and any supporting evidence is insufficient to create a  
8 genuine issue of material fact.").

9 MKM further argues in his opening brief that "[w]ithout  
10 citing any legal authority, the Trustee calls the payments to  
11 Michael K a 'draw' and concludes without a rationale that he is  
12 outside the protection of § 549(b). That contention is without  
13 merit." These statements are merely argument and, as previously  
14 mentioned, there is no evidentiary support for the essential  
15 elements of MKM's defense in the record. See British Airways  
16 Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978) (legal  
17 memoranda and oral argument are not evidence and cannot create  
18 issues of fact capable of defeating otherwise valid motion for  
19 summary judgment).

20 In sum, MKM has for the most part relied on his pleadings  
21 or conclusory statements in his declaration to raise a triable  
22 issue of fact. This proof is insufficient. A "complete failure  
23 of proof concerning an essential element of the nonmoving  
24 party's case necessarily renders all other facts immaterial" to  
25 entitle the moving party to summary judgment. Celotex, 477 U.S.  
26 at 323. Accordingly, on the basis of the facts stated in  
27 Mordy's and Henrie's declarations and accompanying exhibits,  
28 summary judgment for the trustee was appropriate with respect to

1 the \$22,000 transfer.

2 **D. Summary Judgment As To The \$340,000 Transfer**

3 MKM argues that the \$340,000 transfer is not avoidable  
4 because the funds were not property of the estate and,  
5 therefore, the trustee failed to meet one of the elements for  
6 his prima facie case under § 549(a), or, alternatively, even if  
7 the funds were property of debtor's estate, the exchange for  
8 value defense applies.

9 **1. Property Of The Estate**

10 For a transfer to be avoided under § 549(a), it must be a  
11 transfer of "property of the estate." "Property of the estate"  
12 is defined by the Bankruptcy Code as "all legal or equitable  
13 interests of the debtor in property as of the commencement of  
14 the case." § 541(a)(1).

15 Generally, under bankruptcy law, money transferred by the  
16 debtor from commingled bank accounts under the debtor's control  
17 "presumptively constitutes property of the debtor's estate,"  
18 because the money could have been used to pay other creditors.  
19 Bullion, 836 F.2d at 1217. Moreover, funds in a commingled  
20 account are property of the debtor's estate when the debtor has  
21 the right to withdraw, transfer, or otherwise use the payment  
22 funds in any way it wanted. Hansen v. MacDonald Meat Co. (In re  
23 Kemp Pac. Fisheries, Inc.), 16 F.3d 313, 316-17 (9th Cir. 1994).

24 In support of his summary judgment motion, the trustee  
25 showed that the \$340,000 transfer to MKM LLC came from Mastro  
26 Properties' bank account which was controlled by debtor.  
27 Further, the trustee's evidence, which was uncontroverted by  
28 MKM, showed that the past practice was for debtor to treat MKM

1 LLCs funds as his own. Mordy declared:

2 The transactions relating to MKM LLC were run through  
3 the Mastro Properties Matrix Account system as if MKM  
4 LLC was a part of Mastro properties with all cash  
5 receipts and disbursement running through the debtor's  
6 Commerce Bank accounts. I have located one document  
7 indicating that MKM LLC established its own bank  
8 account with Washington Trust . . . on June 5th, 2009.

9 MKM argues that the LLCs agreed to advance funds  
10 postpetition to help finance Mastro Properties' operations; that  
11 the funds coming from insurance policy proceeds were the  
12 property of the LLCs; that MKM LLC advanced \$420,000 to Mastro  
13 Properties; and that Mastro Properties paid MKM LLC back in part  
14 with the LLCs "own funds" of \$340,000.

15 MKM points to no evidence in the record that supports these  
16 factual assertions. MKM cites only his own and Kenyon's  
17 declaration, both of which state the same facts in conclusory  
18 fashion. Neither declaration states that Mastro Properties  
19 repaid MKM LLC with MKM LLC's "own funds" nor do they provide  
20 further detail or refer to other evidence to support MKM's  
21 contentions.<sup>9</sup> In short, for the most part MKM relied on his  
22 pleadings or conclusory statements in his or Kenyon's  
23 declaration. The declarations fail to provide admissible  
24 evidence or reference facts established by admissible records  
25 that raise a triable issue of fact on this issue. Thus, as a  
26 matter of law, the \$340,000 transfer was property of debtor or  
27 the estate within the meaning of the applicable provisions of  
28 the Bankruptcy Code. Accordingly, unless the exchange for value

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<sup>9</sup> MKM made no attempt to trace MKM LLCs interest in the funds that were commingled with those in Mastro Properties' bank accounts.

1 defense is applicable, the trustee may avoid the transfer  
2 because it was property of debtor's estate.

3 **2. Exchange For Value Defense Under § 549(b)**

4 MKM argues that the exchange for value defense applies  
5 because MKM LLC provided a net benefit of \$192,000 to Mastro  
6 Properties. MKM arrives at this figure by taking the payments  
7 by MKM LLC of \$420,000 and \$112,000 made to Mastro Properties  
8 during the gap period and subtracting the \$340,000 transfer.  
9 MKM urges us to consider the entire transaction, namely, what  
10 MKM LLC got and what it gave up during the gap period.<sup>10</sup>

11 Because the purpose of the § 549(b) exception is to allow a  
12 business to continue normal operations while an involuntary  
13 petition is pending, Pucci Shoes, 120 F.3d at 40, cash payments  
14 made to a debtor could conceivably constitute "value" under  
15 § 549(b). However, we could locate no evidence that met the  
16 threshold inquiry whether the cash paid by MKM LLC allowed  
17 Mastro Properties to continue operations during the gap period.  
18 The only evidence presented is that Mastro Properties  
19 transferred funds of \$900,000 from insurance proceeds to MKM  
20 LLC, of which MKM LLC transferred back \$420,000 and \$112,000,  
21 and Mastro Properties transferred back \$340,000. Moreover, the  
22 evidence showed that MKM LLC transferred \$258,000 of the

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23  
24 <sup>10</sup> For this proposition MKM cites Pucci Shoes, 120 F.3d at  
25 41. Pucci Shoes simply holds that the value provided and the  
26 property of the bankruptcy estate do not have to be exchanged  
27 simultaneously. Rather, all that is required is that the  
28 property and the value be exchanged during the gap period. Pucci  
Shoes does not stand for the proposition that transfers made  
during the gap period are simply netted out without reference to  
any other facts to determine the extent of the "value".

1 \$340,000 to a new entity, HAR Construction, which then paid the  
2 former employees of Mastro Properties allegedly for their work  
3 preparing debtor's schedules. These transactions do not show  
4 that any of MKM LLC's alleged cash payments were used to "fund  
5 operations" of Mastro Properties during the gap period.

6 Moreover, these payments would not constitute value under  
7 § 549(b) if they were made in satisfaction of a debt that arose  
8 before the commencement of the case. The trustee sought to show  
9 the \$340,000 transfer fell within this exclusion. In support of  
10 his motion, the trustee submitted Mordy's declaration showing  
11 (1) that MKM LLC never had any independent financial existence  
12 until shortly before the bankruptcy filing; (2) that the sole  
13 purpose of MKM LLC was to hold insurance policies on the life of  
14 debtor, (3) that no separate accounting existed for MKM LLC  
15 until June 25, 2009, 15 days before the involuntary petition,  
16 when \$900,000 attributed to "insurance" was deposited into the  
17 new MKM LLC bank account; (4) that the only other significant  
18 deposit into the MKM LLC bank account was \$340,000 made by  
19 Mastro Properties during the gap period; (5) that debtor had  
20 made payments for the benefit of MKM LLC totaling \$1,402,832.61  
21 between April 2008 and July 6, 2009; and (5) that Mastro  
22 Properties also transferred \$2.4 million to Northern Trust Bank  
23 for the benefit of MKM LLC, out of the proceeds from the closing  
24 of a sale of the debtor's property on North 94th Street in  
25 Seattle, WA.

26 In addition, attached to the declaration of Henrie was a  
27 fax transmission dated March 21, 2008, from Gary R. English, an  
28 attorney for either debtor or MKM. In that memorandum, English

1 stated that MKM LLC still owed debtor \$1,525,000. The purpose  
2 of the communication was for estate tax planning purposes in  
3 which English opined that debtor should explore getting bank  
4 financing for MKM LLC in order to comply with IRS estate tax  
5 guidelines.

6 If uncontroverted, this evidence shows that MKM LLC had no  
7 financial independence and thus was indebted to debtor,  
8 warranting summary judgment in favor of the trustee.

9 MKM had the burden of producing evidence that raised a  
10 triable issue of fact on these issues. MKM submitted the  
11 declaration of Kenyon, who declared that the English fax  
12 transmission was "not an accounting" and also failed to take  
13 into account an \$11.4 million loan from Citibank which was paid  
14 off by MKM LLC in the Northern Trust refinance and which  
15 resulted in a benefit to debtor of \$9.5 million. According to  
16 Kenyon, if one considers this transaction, debtor owed \$8  
17 million to MKM LLC rather than MKM LLC owing \$1.5 million to  
18 debtor. Kenyon further declared that the accounting system  
19 showed that from the second half of 2007, through the bankruptcy  
20 petition date, the LLC was a net supplier of cash to debtor of  
21 \$1,642,176.

22 When considering a summary judgment, we do not weigh the  
23 evidence or assess credibility. Anderson, 477 U.S. at 255.  
24 Instead, "the evidence of the non-movant is to be believed, and  
25 all justifiable inferences are to be drawn in his favor." Id.  
26 However, this does not mean that we accept as true assertions  
27 made by the non-moving party that are flatly contradicted by the  
28 record. See Scott v. Harris, 550 U.S. 372, 380 (2007) ("When



1 opposing parties tell two different stories, one of which is  
2 blatantly contradicted by the record, so that no reasonable jury  
3 could believe it, a court should not adopt that version of the  
4 facts for purposes of ruling on a motion for summary  
5 judgment." ).

6 Here, in reviewing the record as a whole, we conclude that  
7 MKM fails to provide evidence on his exchange for value defense  
8 other than to create a dispute concerning the characterization  
9 of the English "accounting." However, this "accounting" between  
10 MKM LLC and debtor does not provide us with crucial additional  
11 information such as the intent of the parties and why they  
12 departed from past practice with these particular transfers.  
13 MKM recognizes this shortfall by arguing in his opening brief  
14 that "at minimum, there is an issue of material fact as to  
15 intent of the parties to provide GAP period funding . . . ."  
16 Yet, MKM did not provide debtor's declaration nor did he provide  
17 evidence that documented the purpose of the transfers.

18 Instead, the uncontroverted evidence presented by the  
19 trustee through Mordy was that MKM LLC was never a supplier of  
20 cash to debtor since all insurance related receipts and  
21 disbursements ran through Mastro Properties' bank account until  
22 \$900,000 was deposited into the newly opened MKM LLC account in  
23 June 2009. Moreover, Mordy declared that MKM LLC had no  
24 independent financial existence from Mastro Properties and that  
25 debtor always treated MKM LLC as part of Mastro Properties until  
26 shortly before the bankruptcy filing. Even then, MKM LLC did  
27 not have any substantial cash that was truly its own; all cash  
28 came from debtor's assets. Thus, without any evidence that the

1 parties intended to treat these transactions differently, we  
2 cannot conclude MKM raised a triable issue of fact. See Scott,  
3 550 U.S. at 580 (noting that [r]espondent's version of events  
4 was so utterly discredited by the record that no reasonable jury  
5 could have believed him). Accordingly, the bankruptcy court's  
6 grant of summary judgment for the trustee on the \$340,000  
7 transfer was proper.

8 **E. MKM's Liability For The \$340,000 Transfer Under § 550**

9 Once the trustee establishes a prima facie case, to the  
10 extent that a transfer is avoided under § 549, the trustee may  
11 recover, for the benefit of the estate, the property  
12 transferred, or the value of such property, from the initial  
13 transferee or subsequent transferee. § 550(a)(1) and (2).

14 Section 550 provides in relevant part:

15 (a) Except as otherwise provided in this section, to  
16 the extent that a transfer is avoided under section  
17 . . . 549 . . . of this title, the trustee may  
18 recover, for the benefit of the estate, the property  
19 transferred, or, if the court so orders, the value of  
20 such property, from –

19 (1) the initial transferee of such transfer or the  
20 entity for whose benefit such transfer was made; or

20 (2) any immediate or mediate transferee of such  
21 initial transferee.

22 Here, the judgment for the \$340,000 transfer was joint and  
23 several against MKM and MKM LLC.

24 The trustee argues that MKM should be held liable for the  
25 transfer because he was a person "for whose benefit such  
26 transfer was made" within the meaning of § 550(a)(1). In the  
27 trustee's view, the transfer was made for MKM's benefit because,  
28 as the sole member of MKM LLC, he had the right to receive the

1 funds. Further, the trustee sought to show that MKM actually  
2 received a benefit because MKM LLC transferred \$22,000 directly  
3 to MKM and MKM received another \$60,000 from HAR Construction, a  
4 company that was established with funds transferred from  
5 MKM LLC.

6 MKM acknowledges that MKM LLC would be liable under  
7 § 550(a)(1) as the initial transferee, but contends that he is  
8 not liable under this section because he was not a person "for  
9 whose benefit such transfer was made." MKM argues that the  
10 transfer was intended to fund new companies during the post-gap  
11 period and that one of those companies paid Mastro Properties'  
12 former employees to prepare debtor's bankruptcy schedules. At  
13 most, MKM contends he was a subsequent transferee of only a part  
14 of the \$340,000 in transfers.

15 We observe that the parties' arguments blend together the  
16 separate and legally distinct concepts of "transferee" status  
17 and that of an "entity for whose benefit such transfer was  
18 made."

19 The structure of [section 550(a)] separates initial  
20 transferees and beneficiaries, on the one hand, from  
21 'immediate or mediate transferee[s]', on the other.  
22 The implication is that the 'entity for whose benefit'  
23 is different from a transferee, 'immediate' or  
24 otherwise.

25 Bonded Fin. Svcs. v. European Am. Bank, 838 F.2d 890, 895 (7th  
26 Cir. 1988). To determine "transferee" status under § 550(a),  
27 the focus is the level of dominion the transferee has over the  
28 funds. Universal Serv. Admin. Co. v. Post-Confirmation Comm. of  
Unsecured Creditors (In re Incomnet, Inc.), 463 F.3d 1064, 1070  
(9th Cir. 2006). "Under the dominion test, 'a transferee is one

1 who . . . has 'dominion over the money or other asset, the right  
2 to put the money to one's own purposes.'" Id. at 1069.

3 The trustee argued in his motion for summary judgment that  
4 "MKM LLC is the initial transferee from which recovery is  
5 available. [MKM] is the sole controlling member of the MKM LLCs  
6 . . . ." The trustee further argued that MKM "used the money as  
7 he wished just as if he had taken a distribution [from the LLC].  
8 His use of the money was no different than if he had taken a  
9 distribution and spent it how he wished, which is exactly what  
10 he did." In his opening brief on appeal, the trustee contends  
11 that "[u]nless one concludes that the LLC was a sham to begin  
12 with, the son had control over what happened to the money. The  
13 son took money out or directed it to his new 'restart' venture."  
14 These arguments are more relevant to determining whether MKM was  
15 a "transferee" because he had the requisite dominion over the  
16 funds.

17 However, the record lacks evidence that shows MKM had the  
18 requisite dominion over the funds once they were transferred to  
19 MKM LLC. In fact, the trustee has presented contrary evidence  
20 showing that MKM LLC had no independent financial existence from  
21 debtor; that debtor treated MKM LLC as part of Mastro  
22 Properties; and that even when MKM LLC opened its own bank  
23 account, Mastro Properties' CFO, Tom Kenyon, had signing  
24 authority over the account. Thus, we cannot conclude that the  
25 record establishes uncontested facts on the issue of MKM's  
26 control over the funds transferred into MKM LLC. If anything,  
27 the trustee's arguments in his own brief show that the record  
28 establishes debtor's continuing control over the funds and that

1 the ultimate beneficiaries of the transfers were the former  
2 employees of Mastro Properties who were paid through HAR.

3 Even without transferee status, if MKM was a person "for  
4 whose benefit the transfer was made" he is strictly liable under  
5 § 550(a)(1). The trustee relies on Kosmala v. Imhof (In re  
6 Hessco Indus., Inc.), 295 B.R. 372 (9th Cir. BAP 2003) to show  
7 that MKM was a person "for whose benefit the transfer was made."  
8 However, Hessco is factually distinguishable.

9 In Hessco, as part of a complex sale and leaseback  
10 transaction, a corporation sold a parcel of commercial property  
11 to a family trust. The trust then leased back the property to  
12 the corporation. One of the income beneficiaries of the family  
13 trust was then elected to the corporation's Board of Directors.  
14 The trust received substantial payments from the corporation  
15 within the year preceding the corporation's bankruptcy, but none  
16 of the money was distributed to the income beneficiaries.

17 A chapter 7 trustee was appointed for the corporation, and  
18 she brought a preference action against several parties,  
19 including the individual income beneficiaries of the trust. The  
20 bankruptcy court found that the income beneficiaries were  
21 persons for whose benefit the transfers were made.

22 The individuals argued on appeal that § 550 mandates  
23 liability for initial transferees and subsequent transferees,  
24 but the income beneficiaries were in neither category. The BAP  
25 affirmed the bankruptcy court's finding that due to the nature  
26 of the trust at issue, the deposits made into the trust were for  
27 the benefit of the Imhofs even though they were not the sole  
28 beneficiaries. The BAP found the individuals liable even though

1 they had received no money.

2 [S]uch parties are liable, whether or not they  
3 actually benefit from the transfers in question . . .  
4 [I]f the transfer is for one's benefit, one is classed  
5 with initial transferees, and not as a subsequent  
6 transferee.

7 While the holding in Hessco is instructive, this appeal  
8 does not involve a trust, but a limited liability company formed  
9 under Washington law. Moreover, from the holding and facts in  
10 Hessco, we cannot make the leap that MKM is a "beneficiary"  
11 within the meaning of § 550(a)(1) simply because he is the sole  
12 member of the LLC. As highlighted above, the uncontroverted  
13 facts imply debtor directed the use of the funds to benefit  
14 employees of Mastro Properties.

15 In reality, MKM does not fit into the traditional examples  
16 of the "entity for whose benefit such transfer was made." That  
17 is, "a guarantor or debtor – someone who receives the benefit  
18 but not the money." Bonded, 838 F.2d at 895. The benefit must  
19 derive directly from the transfer, not from the use to which it  
20 is put by the transferee. "Someone who receives the money later  
21 on is not an 'entity for whose benefit such transfer was made.'" Id.  
22 at 896. For this reason, we conclude that MKM's rights as  
23 the sole member of MKM LLC is not alone sufficient to qualify  
24 him as a person for whose benefit the transfer was made within  
25 the meaning of § 550(a)(1).

26 In sum, reversal is appropriate because we cannot conclude  
27 that the summary judgment record established uncontested facts  
28 on this issue.<sup>11</sup>

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<sup>11</sup> This decision does not foreclose the possibility of the trustee filing another motion for summary judgment.

1 **VI. CONCLUSION**

2 For the reasons stated above, we AFFIRM the bankruptcy  
3 court's decision granting summary judgment for the trustee on  
4 the avoidability of the transfers. However, we conclude that  
5 the record does not establish as a matter of law that MKM was a  
6 person "for whose benefit the [\$340,000] transfer was made."  
7 Accordingly, we REVERSE the bankruptcy court's decision to grant  
8 summary judgment on MKM's joint and several liability for the  
9 \$340,000 transfer.

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