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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NOT FOR PUBLICATION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. NC-11-1193-HSaD
)
 LORI MAC, INC.,) Bk. No. 07-30165
)
 Debtor.) Adv. No. 07-03136
)
)
 PACIFIC SPORTS SECTION, INC.,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 E. LYNN SCHOENMANN, Chapter 7)
 Trustee; UNITED STATES)
 TRUSTEE, San Francisco,)
)
 Appellees.)
)

Argued and Submitted on January 19, 2012
at San Francisco, California

Filed - April 5, 2012

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Appearances: James S. Monroe of Monroe Law Group argued for
 appellant Pacific Sports Section, Inc. Aron Mark
 Oliner of Duane Morris LLP, argued for appellee,
 E. Lynn Schoenmann, Chapter 7 Trustee.

Before: HOLLOWELL, SALTZMAN,² and DUNN, Bankruptcy Judges.

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 Hon. Deborah J. Saltzman, Bankruptcy Judge for the
 Central District of California, sitting by designation.

1 550, two transfers it alleged were constructively fraudulent (the
2 Adversary Proceeding). The first transfer involved a promissory
3 note, known as the Ignacio Note, which is discussed more fully
4 below. The second transfer involved a series of cash transfers
5 made by the Debtor to TISFS. The bankruptcy court bifurcated the
6 Adversary Proceeding into two phases, the first to address the
7 transfer of the Ignacio Note; the second to address whether the
8 Trustee could avoid the cash transfers made by the Debtor. This
9 appeal concerns only the Ignacio Note.

10 The Ignacio Note

11 In May 2001, Ignacio Properties LLC (Ignacio) and Legg
12 executed a promissory note in the amount of \$335,000 (the Ignacio
13 Note). The Ignacio Note was secured by a second deed of trust on
14 a shopping center in Novato, California, which was operated and
15 managed by a subsidiary of TISFS.

16 In November 2004, Legg assigned the Ignacio Note to the
17 Debtor. On January 31, 2007 (the Transfer Date), within two
18 weeks of the Petition Date, the Debtor executed an Assignment of
19 Mortgage, transferring the Ignacio Note and deed of trust to PSS.
20 PSS paid \$260,000³ for the Ignacio Note, but the money was paid
21 to TISFS rather than the Debtor. After the Petition Date,
22 Ignacio refinanced the Property and paid off the Ignacio Note.
23 The proceeds of the Ignacio Note, \$530,643.27, are being held in
24 escrow pending the conclusion of the adversary proceeding,
25 including this appeal.

26
27 ³ The purchase price was \$300,000, but there was a \$40,000
28 concession for the cost of certain necessary improvements for the
Property.

1 Factual Dispute

2 While there is no dispute that the Debtor's financial
3 difficulties rendered it insolvent as of the Petition Date (its
4 debts exceeded its assets), the parties dispute whether the
5 Ignacio Note was transferred for reasonably equivalent value, and
6 therefore, whether it constituted a constructively fraudulent
7 transfer.

8 The Trustee contends that the Debtor received no
9 consideration for the Ignacio Note. PSS, on the other hand,
10 asserts that the consideration the Debtor received was a \$260,000
11 reduction in a debt it allegedly owed to TISFS. PSS contends
12 that the Debtor agreed to sell it the Ignacio Note in July 2006,
13 and that PSS agreed to pay for the Ignacio Note in four
14 installments between December 21, 2006, and January 31, 2007.
15 ER 103. Because TISFS routinely paid various operating expenses
16 for the Debtor, Legg believed that the Debtor owed TISFS more
17 than \$260,000. Therefore, she directed PSS to make the payments
18 on the Ignacio Note to TISFS, rather than the Debtor, in order to
19 satisfy the Debtor's debt to TISFS. As a result, PSS argues that
20 the Debtor received reasonably equivalent value for the Ignacio
21 Note. Thus, the central issue in this case is whether the Debtor
22 did, in fact, owe an obligation to TISFS on the Transfer Date.

23 Payment of Expenses

24 TISFS paid many of the Debtor's (and its other
25 subsidiaries') operating expenses, including payroll, payroll
26 benefits and rent for the San Francisco office (the Allocated
27 Services). In turn, the Debtor made monthly payments to TISFS
28 for its share of the Allocated Services. However, the Debtor

1 paid separately the payroll for employees who worked solely for
2 it, rather than those who worked for the Debtor as well as other
3 TISFS subsidiaries (the Direct Services).

4 The Debtor maintained an accounting of payments for Direct
5 Services and Allocated Services. Among those records, three were
6 significantly relied on by the parties as evidencing whether the
7 Debtor owed TISFS money at the Transfer Date: (1) a spreadsheet,
8 which was allegedly a contemporaneously maintained "working
9 document" that tracked the Debtor's Direct Services payments, the
10 estimated Allocated Services payments, and payments received by
11 the Debtor from TISFS (Trial Ex. 1 or the Spreadsheet); (2) a
12 spreadsheet generated after the Petition Date that listed the
13 Allocated Services paid by TISFS on behalf of the Debtor and its
14 other subsidiaries (Trial Ex. 2 or the Alternate Ledger); and
15 (3) the Debtor's contemporaneously maintained QuickBooks report,
16 which tracked all payments made between TISFS and the Debtor
17 (Trial Ex. 3 or the Ledger).

18 The bankruptcy court held a three-day trial on the first
19 phase of the Adversary Proceeding. Subsequently, on December 21,
20 2010, the bankruptcy court issued its findings of fact and
21 conclusions of law. The bankruptcy court found that according to
22 the accounting records, the Debtor did not owe a debt to TISFS on
23 the Transfer Date, but rather TISFS owed the Debtor over \$1.7
24 million. The bankruptcy court's finding was based on its
25 determination that TISFS' payments for Allocated Services were
26 capital contributions to the Debtor (which did not create a debt
27 obligation), and the subsequent payments made by the Debtor to
28 TISFS were, therefore, loans.

1 The bankruptcy court entered a judgment on April 6, 2011,
2 allowing the Trustee to avoid and recover the Ignacio Note under
3 §§ 548 and 550 for the benefit of the Debtor's estate. PSS
4 timely appealed.

5 II. JURISDICTION

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 § 157(b)(2)(H), and § 1334. We have jurisdiction under 28 U.S.C.
8 § 158.

9 III. ISSUE

10 Did the bankruptcy court err in finding that the Debtor did
11 not receive any value for the transfer of the Ignacio Note,
12 rendering it constructively fraudulent?

13 IV. STANDARDS OF REVIEW

14 The bankruptcy court's findings of fact are reviewed for
15 clear error, while its conclusions of law are reviewed de novo.
16 Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109 (9th
17 Cir. 2010). Determining reasonably equivalent value of a
18 transfer is a question of fact. Id.; see also 5 COLLIER ON
19 BANKRUPTCY, ¶ 548.05 (Alan N. Resnick & Henry J. Sommer, eds.,
20 16th rev. ed. 2011); Tex. Truck Ins. Agency, Inc. v. Cure (In re
21 Dunham), 110 F.3d 286, 288-89 (5th Cir. 1997) (collecting cases).

22 A finding is clearly erroneous if it is "illogical,
23 implausible, or without support in the record." Retz v. Samson
24 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing United
25 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)
26 (en banc)). The clearly erroneous standard does not "entitle a
27 reviewing court to reverse the finding of the trier of fact
28 simply because it is convinced that it would have decided the

1 case differently." Anderson v. City of Bessemer City, N.C.,
2 470 U.S. 564, 573 (1985). Moreover, when factual findings are
3 based on determinations regarding the credibility of witnesses,
4 we give great deference to the bankruptcy court's findings,
5 because the bankruptcy court, as the trier of fact, had the
6 opportunity to note "variations in demeanor and tone of voice
7 that bear so heavily on the listener's understanding of and
8 belief in what is said." Id. at 575; see also Rule 8013.

9 **V. DISCUSSION**

10 Section 548 allows a trustee to avoid fraudulent transfers.
11 Under this section, a bankruptcy court can set aside "not only
12 transfers infected by actual fraud but certain other transfers as
13 well, so-called constructively fraudulent transfers." BFP v.
14 Resolution Trust Corp., 511 U.S. 531, 535 (1994). Section
15 548(a)(1)(B) allows for the avoidance of constructively
16 fraudulent transfers of an interest of a debtor in property.

17 In order for the Trustee to avoid the transfer of the
18 Ignacio Note to PSS, she was required to demonstrate that:
19 (1) the Debtor had an interest in property; (2) a transfer of
20 that interest occurred within two years of the filing of the
21 bankruptcy petition; (3) the Debtor was insolvent at the time of
22 the transfer or became insolvent as a result thereof; and (4) the
23 Debtor received less than reasonably equivalent value in exchange
24 for such transfer. Id. Only the fourth element is at issue in
25 this appeal.

26 The bankruptcy court found that the Debtor received less
27 than reasonably equivalent value in exchange for the transfer of
28 the Ignacio Note. The bankruptcy court's decision on this issue

1 centered on its finding that there was not an obligation owing by
2 the Debtor to TISFS at the Transfer Date. The key finding in
3 this regard was the bankruptcy court's determination that TISFS'
4 payment of Allocated Services constituted capital contributions
5 to the Debtor, which created no corresponding obligation on the
6 part of the Debtor. Therefore, the bankruptcy court determined
7 that the payments the Debtor remitted to TISFS on Allocated
8 Services had to be accounted for as loans under accounting
9 principles. As a result, the bankruptcy court found that the
10 balances due and owing between TISFS and the Debtor as of the
11 Transfer Date indicated that TISFS owed the Debtor more than \$1.7
12 million.

13 PSS contends this finding is "unsupported by anything in the
14 record." PSS asserts that the Spreadsheet and the Alternate
15 Ledger demonstrated that the Debtor was obligated to pay TISFS
16 for its own business expenses--the Allocated Services and Direct
17 Services. PSS argues that TISFS only acted as a paymaster or
18 conduit for paying those expenses. PSS asserts that the
19 Spreadsheet and the Alternate Ledger demonstrated that TISFS'
20 payments were not capital contributions but advances to the
21 Debtor, which created an obligation the Debtor was required to
22 repay. As a result, PSS argues that the Debtor owed TISFS an
23 amount greater than \$260,000 on the Transfer Date.

24 However, the bankruptcy court did not find the Spreadsheet,
25 Alternate Ledger or Legg's testimony about the accounting
26 credible. Instead, the bankruptcy court found the testimony of
27 the Trustee's accounting expert (the Expert) persuasive. The
28 Expert stated that, according to the Ledger, which was

1 contemporaneously maintained by John Castello, the Chief
2 Financial Officer for both TISFS and the Debtor,⁴ it appeared
3 that TISFS treated the payment of Allocated Services as capital
4 contributions to the Debtor and treated the Debtor's payment of
5 its share of the Allocated Services as loans to TISFS. Based on
6 the balances from the Ledger, the Debtor owed nothing to TISFS on
7 the Transfer Date.

8 TISFS' independent auditor confirmed the figures in the
9 Ledger as fairly representing the balances due between the Debtor
10 and TISFS. Legg and Castello both signed letters confirming the
11 auditors' findings.

12 Nevertheless, PSS contends that the Ledger is inaccurate
13 because it did not account for TISFIS' payment of Allocated
14 Services. However, the Expert testified that the only Allocated
15 Service item not provided on the Ledger was the rent, presumably,
16 he opined, to minimize the gap in the Debtor's capital account
17 that the Debtor was required to maintain for FNMA regulatory
18 purposes. Indeed, the Expert opined that the practice of
19 treating TISFIS' payments for Allocated Services as capital
20 contributions would serve to increase the Debtor's capital
21 account, something that was required since the Debtor's financial
22 situation made it difficult for it to otherwise maintain the
23 minimum capital requirements under FNMA regulations. Hr'g Tr.
24 (Dec. 14, 2010) at 33-34.

25
26 ⁴ Mr. Castello left the employment of TISFIS and the Debtor
27 approximately three months before the Petition Date and did not
28 testify at the trial as to the accounting practices reflected in
the Ledger.

1 It may have been plausible for the bankruptcy court to have
2 inferred from the Alternate Spreadsheet and Legg's testimony that
3 TISFS's payments for Allocated Services were advances that the
4 Debtor was obligated to repay. However, it was also plausible
5 for the bankruptcy court to infer that the Ledger, supported by
6 the Expert testimony and audit letters demonstrated that the
7 payments made by TISFS were capital contributions, and thus, did
8 not create a debt obligation between the Debtor and TISFS.
9 Because there were two plausible interpretations of the evidence,
10 the bankruptcy court's finding that there was no obligation owing
11 by the Debtor to TISFS on the Transfer Date is not clearly
12 erroneous. S.E.C. v. Rubera, 350 F.3d 1084, 1093-94 (9th Cir.
13 2003) ("So long as the district court's view of the evidence is
14 plausible in light of the record viewed in its entirety, it
15 cannot be clearly erroneous, even if the reviewing court would
16 have weighed the evidence differently had it sat as the trier of
17 fact."); In re JTS Corp., 617 F.3d at 110 quoting Anderson v.
18 City of Bessemer City, N.C., 470 U.S. at 574 ("[I]f there are two
19 views of the evidence, a court's choice between them is not
20 clearly erroneous."). Moreover, we defer to the bankruptcy
21 court's finding that Legg's testimony - including that TISFS
22 intended to treat its payment of Allocated Services as advances
23 to the Debtor rather than capital contributions - was not
24 credible.

25 Accordingly, the bankruptcy court's finding that the Trustee
26 proved the Debtor received less than reasonably equivalent value
27 for the transfer of the Ignacio Note is not clearly erroneous.
28

1 **VI. CONCLUSION**

2 For these reasons, we AFFIRM the judgment of the bankruptcy
3 court allowing the Trustee to avoid and recover the Ignacio Note
4 for the benefit of the estate.

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