

SEP 15 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-10-1520-MkBPa
)		CC-10-1521-MkBPa
MACH I AVIATION, INC.,)	Bk. No.	SV-10-14811-VK
Debtor.)	Adv. No.	SV-10-01225-VK
_____)		
WRIGHT FLIGHT AVIATION, INC.,)		
Appellant,)		
v.)	MEMORANDUM*	
BRAD D. KRASNOFF, Chapter 7)		
Trustee,)		
Appellee.)		
_____)		

Argued and Submitted on
July 21, 2011, at Pasadena, California

Filed - September 15, 2011

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding**

Before: MARKELL, BRANDT,*** and PAPPAS, Bankruptcy Judges.

*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.

**In January 2011, the bankruptcy case and the underlying adversary proceeding related to this appeal were assigned to Judge Victoria S. Kaufman upon the retirement of Judge Kathleen Thompson. As a consequence, although Judge Kaufman entered the final order leading to this appeal on February 10, 2011, that order was based entirely on Judge Thompson's prior orders.

***Hon. Philip H. Brandt, Bankruptcy Judge for the District
(continued...)

1 **INTRODUCTION**

2 This case is about the ownership of an aircraft - fast, but
3 not supersonic. The bankruptcy court ruled on summary judgment
4 that the original owner had lost title to the debtor before debtor
5 filed its bankruptcy case. The bankruptcy court further ruled
6 that, because the original owner's state court action to recover
7 the aircraft had not been reduced to judgment before the debtor
8 filed its case, the chapter 7¹ trustee's interest in the aircraft
9 was superior, and the original owner was limited to a claim
10 against the bankruptcy estate.

11 Holding that title had not passed to the debtor under the
12 Uniform Commercial Code, and that the original owner's equitable
13 causes of action are not claims under the Bankruptcy Code, we
14 REVERSE and REMAND.

15 **STATEMENT OF FACTS²**

16 **A. The Key Players and the Events Leading up to the Disputed**
17 **Ownership of the Aircraft**

18 Nathan East ("East") is a professional musician and an
19 airplane enthusiast. Before 2001, East owned and controlled
20

21 ***(...continued)
22 of Washington, sitting by designation.

23 ¹Unless specified otherwise, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 all Rule references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037. All Civil Rule references are to the
27 Federal Rules of Civil Procedure.

28 ²As this appeal involves a summary judgment motion, no facts
have been found. As a consequence, unless otherwise indicated,
this statement of facts draws on the allegations and contentions
of the appellee.

1 Northwing Aviation, LLC ("Northwing") which held title to a
2 Lancair IV-P experimental airplane, FAA tail number N424E
3 ("N424E"). David Riggs ("Riggs") was an acquaintance of East's
4 who liked to pilot airplanes.³ Through Northwing, East leased
5 N424E to Riggs who in turn agreed to pay, among other things,
6 N424E's operating and maintenance expenses. Ultimately, N424E was
7 destroyed in an accident. East used the insurance proceeds from
8 the accident to purchase a new airplane, a 1996 Lancair IV-P
9 Aircraft, FAA Tail number N484E ("Aircraft"). According to East,
10 the Aircraft is unique in the private aviation world because of
11 its high level of performance; in short, it's fast.

12 Ownership and control of the Aircraft are at the heart of
13 this appeal. East claims that Riggs used false pretenses first to
14 obtain control of, and then to steal, the Aircraft. According to
15 East, Riggs began his deception by suggesting that East form a
16 Nevada corporation to hold title to the Aircraft. Riggs
17 represented that he was both willing and able to form the
18 corporation on East's behalf. East relied on Riggs to form the
19 Nevada corporation because East himself lacked the relevant
20 expertise and because he was at the time fully occupied with his
21 obligations as a professional musician.

22 In October 2001, Riggs formed Wright Flight Aviation, Inc.
23 ("Wright Flight"), as a Nevada corporation to own and operate the
24 Aircraft. East maintains that only he and his wife were supposed

25
26 ³Riggs is also a felon who has been convicted of bank, wire
27 and passport fraud and who had served time in the federal
28 penitentiary in Leavenworth, Kansas. East contends that he did
not learn of Riggs' past until 2008. See Decl. of Nathan East
(Oct. 14, 2010) at ¶ 21 and ex. 8 thereto.

1 to own and control Wright Flight and that he never agreed nor
2 authorized Riggs to be a shareholder, director, or officer of
3 Wright Flight. Riggs repeatedly assured East that Riggs had taken
4 care of all corporate formalities consistent with East's
5 instructions.

6 Despite these assurances, Riggs named himself as the sole
7 officer of Wright Flight when he formed it in 2001. He then
8 continued as an officer and/or director until August 2007. East
9 contends that Riggs was able to conceal his true actions regarding
10 Wright Flight because Riggs kept Wright Flight's corporate
11 records.

12 On or about November 15, 2001, Riggs and Wright Flight
13 entered into a written lease agreement for the use and maintenance
14 of the Aircraft (the "Lease Agreement"). East signed the Lease
15 Agreement on behalf of Wright Flight and Riggs signed the Lease
16 Agreement on his own behalf. The lease terms were similar to
17 those of Riggs' prior lease of N424E. In exchange for his use of
18 the Aircraft, Riggs agreed to pay all fees and costs associated
19 with the Aircraft's registration, insurance, storage, repair and
20 maintenance. The initial lease term was for three years, but the
21 parties extended it, and Riggs continued to use the Aircraft
22 pursuant to the Lease Agreement.

23 On the surface, this arrangement seemed to work without
24 incident until 2007. About that time, however, Riggs created a
25 document entitled "Aircraft Loan Agreement." This Agreement,
26 dated January 14, 2007, states that it is between Wright Flight
27 and Mach I Aviation, Inc., the debtor in this case and also a
28 Nevada corporation ("Mach I"). The Aircraft Loan Agreement

1 formalizes and documents a purported loan of \$150,000 from Mach I
2 to Wright Flight.⁴ Riggs signed the Aircraft Loan Agreement twice
3 - once as Wright Flight's corporate secretary, and once as Mach
4 I's chief executive officer. East never signed it. Riggs then
5 executed a second document on behalf of Wright Flight. This
6 document, also dated January 14, 2007, granted Mach I a security
7 interest in the Aircraft to secure Wright Flight's \$150,000 debt
8 ("Security Agreement").⁵ East never signed this document either.
9 Indeed, East contends that he never found out about either
10 agreement until years later.

11 Sometime in late 2007, East discovered that Riggs had not
12 followed East's instructions regarding whom to name as the
13 officers and directors of Wright Flight.⁶ In response, on
14

15 ⁴The Aircraft Loan Agreement indicated that Mach I had lent
16 \$150,000 to Wright Flight to fund various repairs to the Aircraft
17 - repairs necessitated by damage incurred during Riggs' use of
18 the Aircraft. If true, this purpose would be contrary to the
19 Lease Agreement, which obligated Riggs to pay for such repairs.

20 ⁵Nothing in the record indicates compliance by either Mach I
21 or Wright Flight with Nev. Rev. Stat. Ann. § 78.140, which
22 restricts transactions involving interested officers or
23 directors. To paraphrase the statute, Nev. Rev. Stat. Ann.
24 § 78.140 validates transactions involving interested officers or
25 directors if any of four circumstances occur: (a) the
26 disinterested directors knowingly and in good faith vote to
27 authorize, approve or ratify the transaction; (b) a majority of
28 shareholders knowingly and in good faith vote to approve or
29 ratify the transaction, (c) the interested officer or director is
30 unaware of his or her financial interest in the transaction at
31 the time the transaction is brought before the directors for
32 action, or (d) the transaction is fair to the corporation at the
33 time it is acted upon. See Nev. Rev. Stat. Ann. § 78.140,
34 subsection 2 (West 2009).

35 ⁶When Riggs formed Wright Flight in 2001, he named himself

(continued...)

1 August 28, 2007, East filed a report with the Nevada Secretary of
2 State removing Riggs as an officer and director of Wright Flight,
3 and naming East and his wife as the sole officers and directors of
4 the corporation.

5 Also in 2007, East discovered that Riggs had damaged the
6 Aircraft in 2006 and that Riggs had failed to obtain insurance for
7 the Aircraft as required in the Lease Agreement. East thereafter
8 terminated the Lease Agreement with Riggs, and took exclusive
9 possession of the Aircraft.

10 All appeared calm with respect to the Aircraft until December
11 2009, when East received a telephone call from a man named Gary
12 Zinger ("Zinger"). Zinger told East that he had been hired to
13 repossess the Aircraft on behalf of Mach I. East met with Zinger
14 in January 2010 and it was then that he saw, for the first time,
15 the Aircraft Loan Agreement, the Security Agreement, and a
16 February 2009 letter to Wright Flight purporting to declare Wright
17 Flight in default under the Loan Agreement.

18 After conferring with East, Zinger declined to repossess the
19 Aircraft on behalf of Mach I. Zinger did, however, "red tag" the
20 Aircraft.⁷ According to East, a "red tagged" plane cannot be used

21 _____
22 ⁶(...continued)
23 the sole officer of Wright Flight. In 2002 and 2003, Riggs filed
24 annual reports with the Nevada Secretary of State naming himself
25 the sole officer of Wright Flight. In 2004, Riggs filed a report
26 with the Nevada Secretary of State naming himself as Secretary
(naming East as President and Treasurer). In 2005, Riggs filed a
report with the Nevada Secretary of State naming himself as
Secretary and Director (naming East as President and Treasurer).

27 ⁷The record is devoid of anything that could give a
28 definitive meaning to the practice of "red tagging" an aircraft,
(continued...)

1 by anyone. Since Zinger "red tagged" the Aircraft, Wright Flight
2 has held the Aircraft at Whiteman Airport in Pacoima, California.

3 On February 22, 2010, Wright Flight filed a civil action in
4 Los Angeles Superior Court (LASC Case No. BC 432305) against,
5 among others, Mach I and its alleged principal Riggs. The
6 complaint stated causes of action for declaratory relief,
7 conversion, and cancellation of written instruments including the
8 Aircraft Loan Agreement and the Security Agreement ("State Court
9 Action").

10 On the same day Wright Flight filed the State Court Action,
11 Mach I, acting through Riggs, filed a "Certificate of Repossession
12 of Encumbered Aircraft" ("Repossession Certificate") with the FAA
13 in Oklahoma City. The Repossession Certificate incorrectly
14 certified that Mach I had repossessed the Aircraft. Mach I also
15 filed an application with the FAA requesting transfer of the
16 Aircraft's registration to Mach I. On March 1, 2010, in apparent
17 reliance upon the inaccurate Repossession Certificate, the FAA
18 transferred registration of the Aircraft from Wright Flight to
19 Mach I and issued a certificate reflecting the transfer of
20 registration ("FAA Registration Certificate").

21 On March 4, 2010, Wright Flight, Riggs, and the other parties
22 to the State Court Action stipulated to entry of a thirty-day
23

24 ⁷(...continued)
25 and we hold that it does not have a meaning sufficiently well-
26 known to be the subject of judicial notice under Rule 201 of the
27 Federal Rules of Evidence. Prior cases indicate that unusable or
28 unsafe aircraft parts are given a "red tag" to indicate their
unsafe nature. See United States v. Ruhe, 191 F.3d 376 (4th Cir.
1999); United States v. Butler, 494 F.2d 1246 (10th Cir. 1974);
ABC, Inc. v. Shanks, 1 S.W.3d 230 (Tex. App. 1999).

1 temporary restraining order providing that 1) no one would attempt
2 to make further efforts to repossess or convey title to the
3 Aircraft until the court had rendered a decision on Wright
4 Flight's injunction request, and 2) no one would operate, fly or
5 move the Aircraft without the written consent of the other
6 parties. Riggs also agreed that he would provide Wright Flight
7 with documentation to substantiate Mach I's purported security
8 interest in the Aircraft. The initial stipulation was voluntarily
9 extended for an additional thirty days on April 9, 2010.⁸

10 **B. Mach I's Bankruptcy Case and Wright Flight's Adversary**
11 **Proceeding**

12 On April 25, 2010, roughly eight weeks after the State Court
13 Action commenced, Riggs filed voluntary chapter 7 petitions for
14 himself, Mach I, and other related entities.⁹ The Aircraft was
15 listed on Mach I's Schedule B, Personal Property, and valued at
16 \$250,000. The schedules filed with the Mach I bankruptcy
17 petition also listed Wright Flight's State Court Action as well
18 as two other state court proceedings.

19 On June 1, 2010, Wright Flight filed a complaint ("Adversary
20 Complaint") in Mach I's bankruptcy case against Brad D. Krasnoff,
21 Mach I's chapter 7 trustee ("Trustee"). The Adversary Complaint
22

23 ⁸In apparent violation of the stipulation, East submitted to
24 the FAA on March 16, 2010 a bill of sale in the name of Mach I,
25 attempting to transfer registration to the Aircraft back to
26 Wright Flight. The FAA apparently received but did not record
either the bill of sale or the registration transfer application
that East submitted with the bill of sale.

27 ⁹Questions concerning the validity of Riggs' authorization
28 of Mach I's bankruptcy filing arose during the course of the
summary judgment proceedings, as discussed below.

1 sought declaratory relief, cancellation of written instruments,
2 and, if necessary, transfer of title to the Aircraft. Unlike its
3 then-stayed State Court Action, Wright Flight did not plead a
4 claim for conversion.

5 The Trustee timely answered the Adversary Complaint and pled
6 a counterclaim for breach of contract. He shortly thereafter
7 filed a summary judgment motion ("Summary Judgment Motion"). In
8 the Summary Judgment Motion, the Trustee did not challenge any of
9 the factual allegations made by Wright Flight/East in the
10 Adversary Complaint. Indeed, the Summary Judgment Motion was not
11 supported by any affidavits or declarations. Rather, the Trustee
12 argued that, since Wright Flight was entitled to monetary damages
13 as a remedy for the theft of the Aircraft, Wright Flight was
14 limited to filing a proof of claim against the estate and was not
15 entitled to any equitable relief with respect to the Aircraft.
16 The Trustee also argued that, since Wright Flight had not at the
17 time of Mach I's bankruptcy filing reduced its constructive trust
18 claim in the State Court Action to judgment, the Trustee's rights
19 to the Aircraft under § 544 were superior to Wright Flight's.
20 Finally, the Trustee claimed that Mach I had title to the
21 Aircraft when it filed, and thus the Aircraft was property of the
22 estate.

23 Wright Flight opposed, and supported its opposition with a
24 statement of genuine issues in dispute, a request for judicial
25 notice, and the declarations of both Nathan East and Jeffrey
26 Gersh. These documents essentially indicate that, among other
27 things, 1) the Aircraft Loan Agreement and the Security Agreement
28 were invalid under Nevada and California law, 2) Mach I's

1 purported security interest in the Aircraft was never properly
2 perfected, 3) the law did not permit a thief to have superior
3 title to the true owner, 4) the Trustee stood in the shoes of the
4 thief so the Trustee's title could not be superior to the true
5 owner, and 5) it was not clear the matter should be heard at all
6 since Riggs was not and likely never had been an officer or
7 director of Mach I.

8 The Trustee filed a reply in support of the Summary Judgment
9 Motion ("Reply"). The Reply did not challenge or dispute any of
10 the factual assertions contained in Wright Flight's opposition
11 papers. Nor did the Trustee ever address the questions raised
12 regarding Riggs's relationship to and authority to act on behalf
13 of Mach I. He simply stood on his original assertions.

14 During the hearing on the Summary Judgment Motion, both
15 Wright Flight's counsel and the bankruptcy court expressed doubt
16 regarding the validity of Mach I's bankruptcy petition and
17 Riggs's authority to sign the petition on behalf of Mach I.¹⁰
18 Wright Flight did not, however, raise the authority argument by
19 way of a motion to dismiss, and the bankruptcy court did not rule
20 on the issue. Nor did the Trustee address the jurisdictional
21 concerns raised by Wright Flight.¹¹

22
23 ¹⁰Mach I's bankruptcy petition was signed by Riggs,
24 supposedly as Mach I's President. However, the Nevada Secretary
25 of State's records reflect that, from 2004 through 2009, Riggs
26 was neither an officer nor a director of Mach I. Instead, the
records reflect that a Mr. Chas Bain was the sole officer and
director of Mach I during this time period.

27 ¹¹Absent a valid, properly-filed bankruptcy petition, the
28 bankruptcy court would lack jurisdiction over the matter. See

(continued...)

1 On November 9, 2010, the bankruptcy court entered an order
2 granting summary judgment in favor of the Trustee ("Summary
3 Judgment Order") and issued a statement of uncontroverted facts
4 and conclusions of law. On November 22, 2010, Wright Flight
5 filed a motion for reconsideration (the "Reconsideration Motion")
6 which the bankruptcy court denied. On December 28, 2010, Wright
7 Flight timely filed notices of appeal from both the Summary
8 Judgment Order and the order denying the Reconsideration Motion.

9 On February 10, 2011, pursuant to a stipulation between the
10 parties, the bankruptcy court entered summary judgment in favor
11 of the Trustee pursuant to Rule 7054 (which incorporates Civil
12 Rule 54(b)). On March 7, 2011, the bankruptcy court entered an
13 order granting Wright Flight a stay pending appeal.

14 JURISDICTION

15 Subject to questions regarding Mach I's authority to file
16 its bankruptcy petition,¹² the bankruptcy court had jurisdiction
17

18 ¹¹(...continued)
19 Price v. Gurney, 324 U.S. 100, 106 (1945) ("If the District Court
20 finds that those who purport to act on behalf of the corporation
21 have not been granted authority by local law to institute the
22 proceedings, [the District Court] has no alternative but to
dismiss the petition."). Accord Hager v. Gibson, 108 F.3d 35, 39
(4th Cir. 1997).

23 ¹²Although Wright Flight questioned Riggs' authority to file
24 a bankruptcy petition on behalf of Mach I, it never formally
25 moved to dismiss Mach I's case. But even if we were to vacate
26 the summary judgment on the ground that the bankruptcy court's
27 jurisdiction over the matter had not been established, the net
28 result would be a remand for further proceedings, the result we
reach below. Although the record is insufficiently developed for
us to determine in the first instance that Riggs lacked the
requisite authority to file a petition on behalf of Mach I, there
is a substantial question as to Riggs' authority that the

(continued...)

1 pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (E) and (K), and
2 we have jurisdiction under 28 U.S.C. § 158(a)(1).

3 **ISSUES**¹³

- 4 1. Did the bankruptcy court err when it granted the Summary
5 Judgment Motion based on § 544(a)?
6 2. Did the bankruptcy court err by treating Wright Flight's
7 Adversary Complaint as a claim under § 101(5)(B)?

8 **STANDARDS OF REVIEW**

9 We review de novo the bankruptcy court's decision to grant
10 summary judgment. Boyajian v. New Falls Corp. (In re Boyajian),
11 564 F.3d 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv.
12 Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP
13 2007). Viewing the evidence in the light most favorable to the
14 non-moving party (i.e., Wright Flight), we determine whether the
15 bankruptcy court correctly found that there are no genuine issues
16 of material fact and that the moving party (i.e., Trustee) is
17 entitled to judgment as a matter of law. Jesinger v. Nev. Fed.
18 Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994).

19
20
21 ¹²(...continued)
22 bankruptcy court should address. On remand, the bankruptcy court
23 should address this issue before it further considers the merits
24 of the Adversary Complaint.

25 ¹³Based on our disposition of this appeal, we do not need to
26 reach any issues regarding the bankruptcy court's denial of the
27 Reconsideration Motion. Furthermore, Wright Flight neither
28 briefed nor argued any such issues on appeal, so they have been
waived. See In re Bankr. Petition Preparers who are not
Certified Pursuant to Requirements of the Ariz. Sup. Ct., 307
B.R. 134, 141 (9th Cir. BAP 2004) (issues not specifically and
distinctly argued in the opening brief are deemed waived) (citing
Laboa v. Calderon, 224 F.3d 972, 980 n.6 (9th Cir. 2000)).

1 DISCUSSION

2 **A. The bankruptcy incorrectly determined that title to the**
3 **Aircraft was transferred from Wright Flight to Mach I.**

4 The bankruptcy court implicitly determined that Wright
5 Flight had lost, and that Mach I had acquired, title to the
6 Aircraft before Mach I filed its bankruptcy case. As a
7 consequence, the most that Wright Flight has is a damages claim
8 for fraud, conversion, or some other common law theory, and to
9 the extent these theories lead to a change of title, they are
10 subordinate to the Trustee's position as a hypothetical lien
11 creditor under § 544(a)(1). In light of the uncontroverted
12 facts, we disagree.

13 In general, § 544(a)(1) empowers the Trustee to avoid
14 certain prepetition interests in property of the debtor to the
15 extent that the interest could have been avoided by a
16 hypothetical judicial lien creditor at the time the bankruptcy
17 was filed. The Trustee's argument under § 544(a)(1) was premised
18 on his belief "that title to the Aircraft was in the name of Mach
19 I as of the date Mach I filed its bankruptcy Petition." See
20 Trustee's Opposition to Wright Flight's Reconsideration Motion
21 (November 30, 2010) at 5:27-28.¹⁴

22
23
24
25 ¹⁴This argument is misplaced. To the extent the trustee
26 alleges that he has title, his claim to possession derives from
27 § 541(a). By contrast, his § 544(a) argument assumes title in
28 the estate, and uses § 544(a) to defeat and subordinate Wright
Flights' common law avoidance claims under, among other things,
fraud and conversion.

1 Notwithstanding the Trustee's belief, the record does not
2 establish that title to the Aircraft ever vested in Mach I.¹⁵ As
3 explained below, the uncontroverted facts demonstrate that, at
4 best, Mach I had a contested security interest in the Aircraft
5 for \$150,000 on the petition date.

6 Before bankruptcy, Mach I neither "repossessed" nor
7 "foreclosed" upon the Aircraft. Whatever the act of "red
8 tagging" the Aircraft accomplished, the Trustee can point us to
9 no authority that such an action effected either a repossession
10 or transfer of title to the Aircraft. Although the parties did
11 not fully explain the procedure, and thus it was inappropriate to
12 enter summary judgment based on the procedure's effect, "red
13 tagging" apparently can occur for a variety of reasons, including
14 a maintenance issue that makes the airplane or its key components
15 unusable.¹⁶ In short, a material issue of fact remains as to the
16 effect of "red tagging" the Aircraft on possession or title.

17
18
19 ¹⁵The Trustee alternately relies on several instances where
20 Wright Flight supposedly admitted that title vested in Mach I as
21 a result of the so-called foreclosure process and/or the issuance
22 of the FAA Registration Certificate. The Trustee's reliance on
23 Wright Flight's inartful statements concerning title is
24 misplaced. Wright Flight consistently argued that Mach I never
25 explained its position at the hearing on the Reconsideration
26 Motion, when its counsel stated, "You have to look at how this
27 all happened. You have to understand that the documents are, in
28 essence, a fraud perpetrated upon the FAA that resulted in
registration being transferred, not title." Hearing Transcript
(Dec. 14, 2010) at 5:18-21.

¹⁶For additional discussion of red tagging, please refer to
note 7, supra.

1 Moreover, there is nothing in the record to suggest that
2 either Mach I or Zinger (Mach I's repossession agent) ever
3 wrested physical control of the Aircraft from Wright Flight. To
4 the contrary, all of the evidence in the record tends to show
5 that Wright Flight has maintained physical custody and control of
6 the Aircraft to this day.

7 The Trustee acknowledged at oral argument that Article 9 of
8 the Uniform Commercial Code governs the foreclosure process
9 related to the Aircraft, and hence whether Mach I now owns the
10 Aircraft. But the Trustee's pleadings and the record do not
11 establish that any transfer of title occurred under Article 9.
12 Under Article 9, for example, even if Mach I had repossessed the
13 Aircraft (which it did not), taking possession does not by itself
14 constitute foreclosure and transfer of title. Generally
15 speaking, foreclosure and transfer of title must be accomplished
16 by a sale, lease or other disposition of the collateral, or by
17 compliance with the strict foreclosure procedures in Article 9.
18 See Crosby v. Reed (In re Crosby), 176 B.R. 189, 191 (9th Cir.
19 BAP 1994) (holding that secured creditors did not accept
20 repossessed collateral in satisfaction of debt when they
21 temporarily retained the collateral before sale but never carried
22 out any of the steps required for strict foreclosure), aff'd,
23 85 F.3d 634 (table)(9th Cir. 1996); see also Cal. Comm. Code
24 §§ 9610; 9620 - 9623. Given the absence of any evidence of the
25 effect of "red tagging" on possession or title, there remains a
26 material issue of fact as to whether Riggs or Mach I divested
27 Wright Flight of title before Mach I filed its bankruptcy case.

28

1 The Trustee strenuously argued to the bankruptcy court that
2 the FAA Registration Certificate transferred title from Wright
3 Flight to Mach I, and the bankruptcy court apparently credited
4 this argument. This was error, and requires a short explanation
5 of the statutes governing aircraft registration.

6 Pursuant to 49 U.S.C. § 44103(c), a certificate of
7 registration issued by the FAA is "not evidence of ownership of
8 an aircraft in a proceeding in which ownership is or may be in
9 issue." 49 U.S.C. § 44103(c)(West 2011)(emphasis added). Simply
10 put, 49 U.S.C. § 44103(c) "shows that between two parties
11 claiming title to an aircraft, FAA registration is meaningless."
12 Sec'y of U.S. Air Force v. Commemorative Air Force, 585 F.3d 895,
13 900 (6th Cir. 2009); Koppie v. United States, 1 F.3d 651, 653
14 (7th Cir.1993) (certificate of registration is "worthless as far
15 as proving ownership"); Hamilton v. Moore Flying, Inc. (In re
16 Hamilton), 197 B.R. 305, 306 (Bankr. E.D. Ark. 1996) (in turnover
17 proceeding, court finds that "registration with the FAA is not
18 evidence of ownership"). Since ownership of the Aircraft
19 is most definitely at issue in this case, the bankruptcy court
20 erred in giving any weight to the FAA Registration Certificate as
21 evidence of a disposition under Article 9.

22 **B. The bankruptcy court misconstrued the Adversary Complaint.**

23 The bankruptcy court made the following conclusions of law:

24 2. Wright Flight seeks recovery for the
25 wrongful conversion of the Aircraft by
26 Mach I. The Aircraft is personal property.
27 Under California law, damages for the
28 wrongful conversion of personal property is
presumed to be first, the value of the
property at the time of the conversion, with
interest from that time, or, an amount
sufficient to indemnify the party injured for

1 the loss which is the natural, reasonable,
2 and proximate result of the wrongful act
3 complained of and which a proper degree of
4 prudence on its part would not have averted;
and second, a fair compensation for the time
and money properly expended in the pursuit of
the property. California Civil Code § 3336.

5 3. Whether or not Plaintiff Wright Flight
6 establishes a right to any of the equitable
7 relief sought in its Complaint, its right to
8 damages for conversion under California law
9 provides an adequate alternative under
10 California law.

11 4. The relief sought, therefore, in
12 Plaintiff's Complaint is a claim within the
13 definition of claims set forth in 11 U.S.C.
14 § 101(5)(A), (B).

15 Statement of Uncontroverted Facts and Conclusions of Law (Nov. 9,
16 2010) at 4:3-21 (emphasis added). Alternately stated, the court
17 concluded as a matter of law that Wright Flight's Adversary
18 Complaint sought relief on account of Mach I's conversion of the
19 Aircraft. That simply is incorrect.

20 The Trustee moved for Summary Judgment largely on the
21 proposition that Wright Flight's Adversary Complaint sought
22 relief for conversion. This view mischaracterizes the relief
23 sought in the Adversary Complaint. Neither the word "conversion"
24 nor any claim for relief resembling conversion is included in
25 Wright Flight's Adversary Complaint.¹⁷ On its face, the relief

26 ¹⁷In California, "'Conversion is the wrongful exercise of
27 dominion over the property of another. The elements of a
28 conversion are [1] the plaintiff's ownership or right to
possession of the property at the time of the conversion; [2] the
defendant's conversion by a wrongful act or disposition of
property rights; and [3] damages.'" Plummer v. Day/Eisenberg,
LLP, 184 Cal. App. 4th 38, 45, 108 Cal. Rptr. 3d 455, 460-461
(2010)(citing Farmers Ins. Exchange v. Zerin 53 Cal. App. 4th
445, 451-452, 61 Cal. Rptr.2d 707 (1997)). Although each of

(continued...)

1 sought in the Adversary Complaint consists of three claims for
2 relief, each couched entirely in equitable terms.

3 Wright Flight's First Claim for Relief sought a declaration
4 that the Aircraft Loan Agreement and the Security Agreement were
5 a sham and the product of fraud, and that neither Mach I nor
6 Riggs acquired any right to or interest in the Aircraft by virtue
7 of these documents. Wright Flight's Second Claim for Relief
8 sought cancellation of the various written instruments that
9 Mach I had presented in support of its purported loan to Wright
10 Flight and its supposed foreclosure of the Aircraft. Finally,
11 its Third Claim for Relief sought (to the extent it had lost
12 title) to have the title to the Aircraft transferred back to
13 Wright Flight from Mach I.

14 Thus, the Adversary Complaint set forth three equitable
15 claims for relief based on the allegedly fraudulent circumstances
16 and documentation surrounding Mach I's purported interest in the
17 Aircraft. Notwithstanding the contents of the Adversary
18 Complaint, the Trustee in the summary judgment proceedings
19 treated Wright Flight's equitable claims as an alternative claim
20 for conversion. The bankruptcy court adopted in toto the
21 conclusions of law proffered by the Trustee, including the
22 Trustee's mischaracterization of Wright Flight's Adversary
23

24 ¹⁷(...continued)
25 these elements may be found at different locations within the
26 Adversary Complaint, they are not set forth together or pled as a
27 claim for relief therein.

28 The fact that Wright Flight was pursuing a conversion cause
of action in the State Court Action is not dispositive of the
claims for relief that Wright Flight could or did plead in the
Bankruptcy Court. The Adversary Complaint speaks for itself.

1 Complaint. Consequently, the court erred because it did not
2 inquire into the legal questions actually posed by the Adversary
3 Complaint. Instead, the court followed the Trustee's lead to a
4 legal issue not actually before the court, arising from a
5 nonexistent claim for conversion.

6 **C. The bankruptcy court incorrectly determined that the**
7 **Adversary Complaint constituted a claim under § 101(5)(B).**

8 The Trustee argued and the bankruptcy court ruled that the
9 equitable relief sought by Wright Flight could be given a dollar
10 value. As such, the court held that Wright Flight's Adversary
11 Complaint was within the definition of "claim" for bankruptcy
12 purposes. Therefore, the court opined that Wright Flight's
13 "claim" was a proper subject for the claims administration
14 process, but not for an adversary proceeding. We disagree.

15 Under § 101(5)(B), "claim" means a

16 right to payment, whether or not such right has been
17 reduced to judgment, or a right to an equitable remedy
18 for breach of performance if such breach gives rise to
19 a right to payment, whether or not such right to an
equitable remedy is reduced to judgment, fixed,
contingent, matured, unmatured, disputed, undisputed,
secured, or unsecured.

20 § 101(5)(B).

21 Congress gave the term "claim" the "broadest available
22 definition." F.C.C. v. NextWave Pers. Commc'ns, 537 U.S. 293,
23 302, 123 S.Ct. 832, 154 L.Ed.2d 863 (2003)(quoting Johnson v.
24 Home State Bank, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66
25 (1991)(internal quotation marks omitted)).

26 On the other hand, "[i]f the only remedy allowed by law is
27 non-monetary, then the equitable remedy is not considered a claim
28 for purposes of bankruptcy and it survives the discharge of the

1 debtor." TKO Prop., LLC v. Young (In re Young), 214 B.R. 905,
2 912 (Bankr. D. Idaho 1997) (citing In re Aslan, 65 B.R. 826, 831
3 (Bankr. C.D.Cal. 1986)).¹⁸ See also 2 Collier on Bankruptcy
4 ¶ 101.05[5] (Alan Resnick & Henry Sommer, eds., 16th ed. 2011)
5 ("When there is no money damage alternative to state court
6 ordered equitable remedies such as resulting trust, partition in
7 kind, or deed reformation, they do not fit the definition of
8 claim under section 101(5)").

9 We thus must look to applicable nonbankruptcy law, in this
10 case California law, to determine whether a money judgment would
11 give Wright Flight a viable alternative to its requested
12 equitable remedies. See, e.g., In re Ben Franklin Hotel Assocs.,
13 186 F.3d 301, 306 (3d Cir. 1999) (money damages not a "viable
14 alternative" to equitable reinstatement of a partnership interest
15 in a partnership owning unique commercial property); Gouveia v.
16 Tazbir, 37 F.3d 295 (7th Cir. 1994) (equitable relief for
17 violation of restrictive, reciprocal land covenant not a claim);
18 Sheerin v. Davis (In re Davis), 3 F.3d 113 (5th Cir. 1993)
19 (equitable remedies of resulting trust, partition in kind, deed
20 reformation are not claims); In re Young, 214 B.R. at 912. If
21 money damages are not a viable alternative, then Wright Flight's

22
23 ¹⁸According to Young, Congress enacted this provision,
24 to cause the liquidation or estimation of contingent
25 rights of payment for which there may be an alternate
26 equitable remedy with the result that the equitable
remedy will be susceptible to being discharged in
bankruptcy.

27 In re Young, 214 B.R. at 912 (quoting 124 Cong. Rec. H11089
28 (Sept. 28, 1978)).

1 equitable remedies should not be treated as a claim under
2 § 101(5)(B), and the Trustee's argument fails.

3 Here, the bankruptcy court ruled in part that Wright
4 Flight's Adversary Complaint sought a recovery for wrongful
5 conversion of the Aircraft and that the primary remedy for
6 conversion under California law is damages equal to the value of
7 the converted property. However, as discussed above, the
8 bankruptcy court erred when it construed the Adversary Complaint
9 as including a claim for conversion. In fact, the Adversary
10 Complaint seeks only equitable remedies for which there are no
11 readily equivalent claims for relief for monetary damages.

12 Applying the analytic framework from Ben Franklin Hotel,
13 Young, and similar cases, Wright Flight's claims for relief do
14 not constitute claims within the meaning of § 101(5)(B).¹⁹ Wright
15 Flight's equitable claims for declaratory relief, cancellation of
16 documents, and for quiet title to its property have no precise or
17 viable damage alternatives. See In re Ben Franklin Hotel

20
21 ¹⁹Under California law, a claim for the recovery of specific
22 property and damages for wrongful retention (which Wright Flight
23 pled in its Adversary Complaint), and a claim for damages arising
24 from the conversion of the property (which Wright Flight did not
25 plead), are distinct claims for relief with distinct remedies.
26 See, e.g., Taylor v. Forte Hotels Int'l, 235 Cal. App. 3d 1119,
27 1 Cal. Rptr. 2d 189 (1991). California law permits the recovery
28 of personal property and the recovery of damages for the
wrongful retention of that property. Therefore, the remedies
sought by Wright Flight in its Third Claim for Relief (Transfer
of Title) are cumulative and not mutually exclusive.
Furthermore, Wright Flight was prepared to waive its claim for
monetary relief to the extent that this cumulative claim confused
the issues regarding its requested equitable relief.

1 Assocs., 186 F.3d at 306 (no claim exists if under nonbankruptcy
2 law money damages are not "a viable alternative").

3 In sum, even though Wright Flight's Adversary Complaint
4 potentially could have given rise to a right to payment if Wright
5 Flight had pled a claim for relief for conversion, that is not
6 how Wright Flight pled its case, nor are money damages a viable
7 alternative to the equitable relief sought. Accordingly, the
8 bankruptcy court incorrectly determined that Wright Flight's
9 requested equitable relief constituted a "claim" under
10 § 101(5)(B).

11 **CONCLUSION**

12 For all of the reasons set forth above, the summary judgment
13 of the bankruptcy court is REVERSED, and this matter is REMANDED
14 to the bankruptcy court for further proceedings.