

DEC 04 2015

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. EC-15-1186-JuFD
)	
VILLAGE CONCEPTS, INC.,)	Bk. No. 12-30911
)	
Debtor.)	Adv. No. 14-2054
)	
DAVID D. FLEMMER,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
MARK WEINER; NANCY WEINER;)	
PARK VILLAGE CORPORATION,)	
INC.,)	
)	
Appellees.)	
)	

Argued and Submitted on November 19, 2015
at Sacramento, California

Filed - December 4, 2015

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

Honorable David E. Russell, Bankruptcy Judge, Presiding**

Appearances: Jeremy Luke Hendrix of Desmond, Nolan, Livaich &
Cunningham argued for appellant; Michael W.
Thomas of Thomas & Associates argued for
appellees.

* 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 8024-1.

** The Honorable Michael S. McManus was assigned to the underlying bankruptcy case and heard all pretrial matters in this adversary. Judge Russell entered the order on appeal.

1 Before: JURY, FARIS, and DUNN, Bankruptcy Judges.

2 Chapter 7¹ trustee David D. Flemmer (Trustee) filed an
3 adversary complaint against Mark and Nancy Weiner (collectively,
4 Weiners or Shareholders), individually and in their capacities
5 as trustees of The Kopp Family Revocable Living Trust (Trust),
6 and Park Village Corporation, Inc. (Park Village). The
7 complaint sought to avoid pre-petition alleged fraudulent
8 transfers made by the debtor, Village Concepts, Inc. (Debtor or
9 VCI), to Park Village and the Trust under Cal. Civil Code
10 §§ 3439.04 and 3439.05 and §§ 544 and 550. After a trial, the
11 bankruptcy court ruled against Trustee and this appeal followed.
12 For the reasons discussed below, we AFFIRM.

13 **I. FACTS**

14 **A. Debtor's Business**

15 Debtor was in the business of selling new and used
16 manufactured homes and managing mobile home parks. Mark is
17 Debtor's president and Nancy is Debtor's secretary. The Trust
18 is Debtor's sole shareholder, and the Weiners are the sole
19 trustees and beneficiaries of the Trust.

20 In March 2009, Park Village was formed. Its sole
21 shareholder is the Trust. Mark is the President and Chief
22 Financial Officer of Park Village.

23 The Weiners or the Trust had an interest in at least nine
24 mobile home parks, including Castle Village, LLC (CV LLC) and

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 Redding Riverside Village, LLC (RRV LLC) (collectively, CV LLC
2 and RRV LLC are referred to as the Mobile Home Parks). CV LLC
3 was a single asset California limited liability company used by
4 Debtor to hold its 50% interest in a mobile home park located in
5 Ione, California. RRV LLC was a single asset California limited
6 liability company used by Debtor to hold its 70% interest in a
7 mobile home park located in Redding, California. Debtor held
8 100% of the membership interests in CV LLC and RRV LLC.

9 **B. The Construction Defect Litigation**

10 In 2005, Donald Harris (Harris) purchased a mobile home
11 from Debtor and lived at Indian Village Estates. In early 2006,
12 Harris complained about numerous defects with the mobile home.
13 The community manager at Indian Village Estates wrote to Harris
14 telling him to contact Mark directly due to the complexity of
15 his issues. Harris and Mark then attended a mediation which was
16 required under the sales agreement. On October 23, 2006, Harris
17 and Debtor entered into a settlement agreement which required
18 Debtor to make repairs.

19 On May 19, 2008, Debtor, along with Champion Home Builders
20 Co., wrote a letter to the homeowners at Indian Village Estates
21 which stated in part: "If you believe you have a claim that may
22 be covered by your warranty, please submit it in writing to the
23 dealer or manufacturer, and we will be happy to work with you to
24 address your particular situation."

25 On October 22, 2008, Harris filed a state court complaint
26 against Debtor alleging that it had breached the settlement
27 agreement and that his mobile home was unsafe and in violation
28 of the sale agreement.

1 On June 8, 2009, attorney Steven H. Haney (Haney) sent a
2 demand letter to Mark and Debtor at 4101 Mother Load Dr.,
3 Shingle Springs, CA 95649.² Haney advised Mark that his firm
4 represented a number of owners of manufactured homes that had
5 been purchased from Debtor who complained that the homes were
6 defectively constructed. Haney made a settlement demand for
7 \$1,250,000 which remained open until June 30, 2009. Debtor did
8 not respond to the demand letter and the letter was not returned
9 to Haney.

10 On August 10, 2009, Haney filed a state court lawsuit
11 against Debtor on behalf of his clients, asserting causes of
12 action for breach of contract, construction defect, and breach
13 of warranty. This case was consolidated with the prior action
14 filed by Harris.

15 On June 5, 2012, a trial in the state court commenced. A
16 jury was impaneled one week before Debtor filed its bankruptcy
17 petition.

18 **C. Debtor's Litigation With Former Employee**

19 Debtor was also involved in state court litigation with a
20 former employee, Stanley Palesano (Palesano). Palesano asserted
21 whistleblowing claims against Debtor, contending that Debtor had
22 tried to stop him from alerting the public to harmful and bad
23 faith construction defect issues. This case was dismissed in
24 June 2009 when the parties agreed to walk away.

25
26 ² Debtor's address was actually 4101 Mother Lode Dr. as
27 opposed to 4101 Mother Load Dr. At trial, Mark testified that
28 Debtor received its mail at P.O. Box 736, Shingle Springs and
that the Mother Lode address was a sales office and the place
where Debtor stored its books and records.

1 **D. The Prepetition Transfers**

2 On June 30, 2009, Debtor transferred its interest in the
3 Mobile Home Parks to Park Village in return for 100% of the
4 stock in Park Village. As part of the same transaction, Debtor
5 transferred its stock in Park Village to its sole shareholder,
6 the Trust.³

7 To document these transactions, Debtor and the Shareholders
8 entered into an Agreement and Plan of Corporate Separation and
9 Reorganization dated June 30, 2009. In Recital B, the
10 Shareholders stated that they believed it was in Debtor's best
11 interest to separate its current business into two corporations:
12 a newly formed corporation, Park Village, would own and operate
13 the Mobile Home Parks and Debtor would continue to own and
14 operate the remaining business. Recital D stated that Debtor
15 intended to transfer all of its ownership interests in the
16 Mobile Home Parks to Park Village in exchange for 100,000 of its
17 shares. Recital E stated that Debtor offered to transfer to
18 Shareholders all of Park Village's shares in a transaction
19 intended to qualify as a tax-free spinoff under Internal Revenue
20 Code (IRC) § 355 and that Shareholders desired to accept such
21 offer pursuant to the terms set forth in the agreement.

22 The Plan of Reorganization also stated that the parties to
23 the agreement intended to effect a tax-free reorganization under
24 IRC §§ 361(A), 355, and 368(A)(1)(D) and that the purpose of the
25 plan was to separate the operations, assets and liabilities of
26 the business into two corporations with the same shareholders of

27
28 ³ Trustee blends these transfers together in his arguments.

1 each corporation.

2 Section 1.2 of the agreement stated:

3 The CORPORATION shall transfer all of its ownership
4 and membership interest and goodwill of the MOBILE
HOME PARKS subject to all of the remaining
5 liabilities, debts, obligations and contracts of the
MOBILE HOME PARKS to the SUBSIDIARY in exchange for
6 100,000 shares of the SUBSIDIARY'S no-par common
stock. The assets transferred to the SUBSIDIARY are
7 shown on Exhibit 'D'. The transfer and assignment of
assets shall be by transfer of membership interests in
8 Castle Village, LLC and Redding Riverside Village, LLC
in form and substance satisfactory to counsel for the
CORPORATION and the SHAREHOLDERS, in each case with
9 such other appropriate instruments of title as counsel
for the SHAREHOLDERS may reasonably request.

10
11 Exhibit "D" to the agreement said: "One thousand
12 membership units in Castle Village, LLC and Redding Riverside
13 Village, LLC are to be transferred to Park Village Corporation."

14 Finally, the agreement stated that the closing would take
15 place at 4101 Mother Lode Drive, Shingle Springs, California as
16 of the end of business on June 30, 2009.

17 **E. Bankruptcy Events**

18 On June 8, 2012, almost three years after the transfers and
19 while the state court construction defect litigation was
20 pending, Debtor filed a chapter 11 petition. The construction
21 defect litigation plaintiffs (Creditors) filed proofs of claim
22 in Debtor's case, asserting unsecured claims greater than \$1.5
23 million.

24 The United States Trustee (UST) filed a motion to dismiss
25 or convert the case because Debtor failed to timely file a plan
26 and disclosure statement by the deadlines set by the court. On
27 March 13, 2013, Debtor filed its chapter 11 plan and disclosure
28 statement. Two days later, Creditors filed a motion to appoint

1 a chapter 11 trustee for the purpose of evaluating whether
2 reorganization was feasible. Creditors alleged that there was
3 strong circumstantial evidence that Mark had caused Debtor to
4 make fraudulent transfers of its property to its sole
5 shareholder, an affiliate entity also controlled by Mark, after
6 he learned of their claims. They also alleged that they had no
7 faith in Debtor's ability or willingness to fulfill its proper
8 role as debtor-in-possession. Finally, Creditors complained
9 that Debtor and its current management had nothing to lose by
10 continuing to operate Debtor in self-dealing transactions.

11 The bankruptcy court conditionally denied the UST's motion
12 to convert or dismiss. On April 24, 2013, the bankruptcy court
13 granted Creditors' motion to appoint a chapter 11 trustee. On
14 May 8, 2013, Flemmer was appointed as chapter 11 trustee.

15 About two months later, Trustee filed a motion to convert
16 the case to chapter 7 on the grounds that (1) Debtor did not
17 have sufficient current and prospective income to sustain
18 operating expenses and professional fees necessary to a
19 successful reorganization, and (2) the principal assets of
20 Debtor consisted of litigation rights and equipment, both of
21 which could be administered in a liquidation as effectively as
22 in a reorganization. The bankruptcy court granted Trustee's
23 motion and converted the case to chapter 7 by order entered on
24 September 11, 2013. Flemmer was then appointed as the chapter 7
25 trustee.

26 **1. The Adversary Complaint For Fraudulent Transfers**

27 On February 13, 2014, Trustee filed an adversary complaint
28 against the Weiners and Park Village alleging that Debtor's

1 transfer of 100% of its interest in the Mobile Home Parks to
2 Park Village in return for 100% of Park Village stock was
3 fraudulent. Trustee also alleged that the issuance of new
4 shares comprising 100% of the outstanding and issued stock in
5 Park Village which were transferred to the Weiners in their
6 capacities as trustees of the Trust was also fraudulent.
7 Trustee maintained that these transfers were made with actual
8 intent to hinder, delay, or defraud a creditor of Debtor under
9 Cal. Civil Code § 3439.04 and §§ 544(b) and 550. Trustee also
10 maintained that the transfers were constructively fraudulent
11 because they were made without receiving reasonably equivalent
12 value in exchange and that Debtor was insolvent at the time the
13 transfers were made. Cal. Civil Code § 3439.05; §§ 544(b) and
14 550. Finally, Trustee sought turnover of the transferred
15 property - Debtor's membership interests in the Mobile Home
16 Parks - pursuant to § 542.

17 **2. Declarations In Lieu Of Direct Testimony**

18 Prior to trial, Debtor filed the declarations of Mark
19 Weiner, Nancy Weiner, Michael Thomas Kutzman, and Burt Douglass⁴
20 in lieu of direct testimony. Trustee filed the declarations of
21

22 ⁴ Douglass was Debtor's CPA. Trustee retained Douglass to
23 prepare Debtor's tax returns after he was appointed. Debtor
24 submitted Douglass' declaration in lieu of direct testimony on
25 the issue of insolvency. Trustee opposed Douglass' declaration
26 in part, contending that his testimony concerned specialized tax
27 knowledge and Douglass had not been disclosed as an expert
28 witness. At trial, Trustee's counsel elicited testimony from
Douglass that Debtor's counsel argued was in the nature of expert
testimony. After some discussion on the record, Trustee's
counsel agreed that Douglass could be designated as an expert and
the bankruptcy court designated him as such.

1 himself, Haney, and Barbara Lawson.⁵

2 **Mark Weiner:** Mark testified that in early 2007, he sold a
3 mobile home park in Southern California and realized a
4 substantial gain. As a result, Mark said that he was thinking
5 of retiring and developing a plan to sell VCI to his children.
6 As part of that plan, Mark wanted to relieve VCI of indebtedness
7 and encumbrances. Therefore, according to Mark, he met with tax
8 attorney and CPA Michael Kutzman in early 2008 to discuss a
9 spinoff of VCI assets that would leave VCI in better financial
10 condition in case his children decided to purchase the company.

11 Mark further testified that on July 1, 2004, VCI converted
12 from a C Corporation to an S Corporation. Consequently, the
13 sale or transfer of any appreciated assets of VCI within a ten
14 year period would result in a built in gains tax being levied
15 against VCI as well as capital gains tax for the shareholders of
16 VCI. This was important as the Mobile Home Parks had a low
17 basis at their acquisition because the parks were acquired as
18 part of 1031 tax deferred exchanges. Due to the built in gains
19 issue, he contacted Kutzman, who proposed the creation of Park
20 Village and an IRC §§ 350 and 358 spinoff of Park Village to the
21 Trust. According to Mark, this would allow the spinoff of the
22 assets without incurring the built in gain and capital gains
23 taxes.

24 Accordingly, on March 16, 2009, VCI formed Park Village to
25 hold its membership interests in the two LLCs. VCI was a 100%

26
27 ⁵ Because the testimony of Nancy Weiner and Trustee is
28 mostly irrelevant to the issues raised in this appeal, a summary
of their testimony is not included.

1 shareholder of Park Village. On June 30, 2009, VCI spun off its
2 Park Village shares to the Trust.

3 Finally, Mark testified that at the time he began
4 discussing the spinoff of the Park Village from VCI with
5 Kutzman, he was not aware of any threatened or pending
6 litigation against VCI by the Creditors represented by Haney.

7 **Michael Kutzman:** Kutzman, who was Debtor's attorney,
8 testified that it was his understanding that Debtor wanted to
9 reorganize so that it could focus on manufacturing and sales and
10 split-off its mobile home park management business. Kutzman
11 declared that he prepared and completed the IRC §§ 355 and 358
12 split-off of the mobile home park related assets and that he was
13 "not aware of any other reason for the split off."

14 **Burt Douglass:** Douglass testified that pursuant to his
15 retention, he reviewed certain documents including Debtor's
16 financial records, bankruptcy statements, appraisals for the
17 Mobile Home Parks, and other accounting records for 2008 through
18 2012. He also reviewed Debtor's balance sheet dated June 30,
19 2009, that was prepared by Mark. Douglass testified that based
20 upon his preparation of tax returns for Debtor, and review of
21 its accounting records, interviews of Kutzman and Mark Weiner,
22 and review of its June 30, 2009 Balance Sheet, Debtor was not
23 left insolvent as a result of the asset spinoffs and was not
24 insolvent as of June 30, 2009. Douglass further opined that
25 Debtor was in a better financial position after the spinoff and
26 that the spinoff of the assets did not result in Debtor's

1 insolvency.⁶ "Indeed, it appears that VCI continued to operate
2 its business as a ongoing concern while paying its bills through
3 early 2012." Finally, Douglass testified that his review of the
4 matter showed that in 2004 Debtor converted from a C corporation
5 to an S Corporation. As a consequence, under IRS rules, Debtor
6 could not sell major assets for ten years without incurring
7 significant built in gains taxes and capital gains taxes.
8 However, IRC §§ 350 and 358 allowed for a spinoff of assets
9 under some circumstances. In Douglass' view, it was normal in a
10 spinoff to separate the companies and business types into
11 individual units to operate more easily, to find funding more
12 easily and to prepare for succession planning.

13 **Steven Haney:** Haney testified as to his representation of
14 Creditors and the sending of the demand letter, which was
15 addressed to Mark and Debtor. Haney testified that the demand
16 letter was not returned.

17 **Barbara Lawson:** Barbara Lawson was Debtor's employee.⁷
18 She was a sales representative and part-time manager at Indian
19 Village Estates where Creditors lived. Lawson testified that
20 she had told Mark about the complaints from residents who were
21 threatening to sue Debtor due to construction problems with the
22 manufactured homes. She also testified that in early 2006, Mark
23 had instructed all sales staff, park management staff,

24
25 ⁶ Although Douglass stated that he reviewed various
26 documents, he did not offer an analysis as to how he reached his
conclusion that Debtor was solvent as of June 30, 2009.

27 ⁷ In 2008, after litigation initiated by Lawson, Debtor
28 obtained a judgment against her for \$986.69. As a result, the
bankruptcy court did not find her testimony credible.

1 construction management, and construction employees to stay away
2 from Donald Harris and others because they were threatening to
3 sue him. Finally, Lawson declared that in January or February
4 2007, she reported to Mark that some of the residents had met
5 with an attorney with respect to the construction defect issues
6 related to the manufactured homes and that they were planning to
7 sue.

8 **3. The Trial**

9 On April 27, 2015, the bankruptcy court held a trial.
10 There was extensive cross examination of Douglass and Mark. At
11 the close of trial, based upon its review of the evidence and
12 testimony, the bankruptcy court made several findings of fact on
13 the insolvency issue. First, the bankruptcy court stated that
14 in its mind, the June 30, 2009, balance sheet prepared by Mark
15 "wasn't a balance sheet," but looked like a trial balance that
16 "somebody had worked up."⁸ Next, the court said that it had
17 heard from the accountant (Burt Douglass) that Debtor was
18 solvent and that it believed the accountant's testimony. Third,
19

20
21 ⁸ The balance sheet contained three columns. The first
22 column showed book value of the assets and liabilities and
23 capital. The second column purported to show market value for
24 the transfers and the third column showed market value as of
25 July 1, 2009, the day after the transfers. The middle column
26 shows that total assets were \$11,268,641.65 (although only the
27 transferred assets were at market value, the others remaining at
28 book value) and total liabilities were \$11,320,490.90 as of
June 30, 2009. Accordingly, the liabilities appeared to exceed
the assets by approximately \$51,000. The balance sheet also
shows that immediately after the transfer on July 1, 2009, the
total assets were \$6,616,652.87 and total liabilities were
\$5,992,148.78 and thus the net capital available after the
transfer was \$624,504.09.

1 the court noted that the 2009 calendar year tax return showed
2 that Debtor was solvent on Schedule L: "It shows that the
3 corporation is solvent. Sure, they had sustained losses but the
4 assets exceeded the liabilities."⁹ Finally, the court observed
5 that although Debtor did not make money between 2009 and 2012,
6 the Debtor was still solvent: "They stayed in business. They
7 paid their bills for three years after the 2009 transfer." In
8 the end, the bankruptcy court concluded that Debtor was solvent
9 both before and after the transfer.

10 Disagreeing with Trustee, the court also implicitly found
11 that Debtor received value in exchange for the transfer. The
12 court found that "[t]here was tremendous value. There was
13 substantial reduction of debt." The court also found that
14 although there was no written agreement for the assumption of
15 debt, there could be an oral agreement: "[A]nd oral agreements
16 are just as enforceable as written agreements and if the parties
17 agreed that the debt was resolved, it's resolved."

18 In considering Debtor's actual fraudulent intent, the
19 bankruptcy court acknowledged that the transaction was between
20 insiders and that they retained control of the assets both
21 before and after the transfers. But the court stated that it
22 was not convinced that Debtor's knowledge of the construction
23 defect litigation showed actual fraud as to the transfer. The

24
25 ⁹ Schedule L "Balance Sheets per Books" showed that at the
26 end of the 2009 calendar tax year, Debtor's total assets and
27 liabilities were \$4,757,072. Douglass testified at trial that
28 after adding up the numbers and backing out the value of the
capital stock and retained earnings, the liabilities would
actually be \$4,924,574. Therefore, at the end of 2009, Debtor's
liabilities would be greater than its assets at book value.

1 court opined that these types of suits were part of doing
2 business: "If you do business and you sell mobile homes, you
3 will have people complain about the type of mobile homes you
4 had." According to the court, if you are in business "you're
5 always going to be threatened with lawsuits. That doesn't mean
6 very much." The court also believed Mark's testimony that he
7 did not know about Haney's demand letter and the threatened
8 lawsuit, noting too that there was no lawsuit actually filed and
9 "it was only a threat."

10 Finally, the bankruptcy court said that it believed Mark's
11 testimony as set forth in his declaration; i.e., that the
12 transfer was made to accomplish a tax spinoff. Mark testified
13 that he contacted his attorney to make the transfer in early
14 2008, long before any threats by Haney were made, and that he
15 was following up on a family plan. According to the court, the
16 transaction did not take place until 2009 because it was a
17 complicated transaction to get done. In the court's view, that
18 Haney's letter said they had to settle by June 30, 2009, the
19 same date the transfer took place, "was just a coincidence."
20 In the end, the bankruptcy court concluded that Trustee failed
21 to show actual fraudulent intent just because of the threatened
22 litigation.

23 The bankruptcy court entered the judgment against Trustee
24 on May 26, 2015. Trustee filed a timely notice of appeal.

25 **II. JURISDICTION**

26 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
27 §§ 1334 and 157(b)(2)(H). We have jurisdiction under 28 U.S.C.
28 § 158.

1 **III. ISSUES**

2 Did the bankruptcy court err in finding that Trustee did
3 not meet his burden of proof on the issue of insolvency?

4 Did the bankruptcy court err in finding that Debtor did not
5 make the transfers with actual fraudulent intent under a “badges
6 of fraud” analysis?

7 **IV. STANDARDS OF REVIEW**

8 We review findings of fact for clear error and conclusions
9 of law and mixed questions of law and fact de novo. Oney v.
10 Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

11 The bankruptcy court’s determinations about insolvency
12 resolve questions of fact which are reviewed for clear error.
13 In re Weinberg, 410 B.R. at 27-28.

14 Whether there is actual intent to hinder, delay, or defraud
15 creditors is also a question of fact. Wolkowitz v. Beverly
16 (In re Beverly), 374 B.R. 221, 235 (9th Cir. BAP 2007) (citing
17 Bulmash v. Davis, 24 Cal.3d 691 (1979); Filip v. Bucurenciu,
18 129 Cal. App. 4th 825 (2005); Annod Corp. v. Hamilton & Samuels,
19 100 Cal. App. 4th 1286 (2002)).

20 A bankruptcy court’s factual determination is clearly
21 erroneous if it is illogical, implausible, or lacks support in
22 inferences that may be drawn from facts in the record. United
23 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)
24 (en banc) (quoting Anderson v. City of Bessemer City, N.C.,
25 470 U.S. at 564, 577 (1985)) (explaining that the clearly
26 erroneous standard of review is an element of the clarified
27 abuse of discretion standard).

28 Where there is admitted evidence in the record to support

1 the bankruptcy court's fact findings, an appellate court cannot
2 substitute its views of the facts for those of the bankruptcy
3 court. Anderson, 470 U.S. at 573. "Where there are two
4 permissible views of the evidence, the factfinder's choice
5 between them cannot be clearly erroneous." Id. at 574.
6 Moreover, findings based on determinations about the credibility
7 of witnesses "demand[] even greater deference to the trial
8 court's findings; for only the trial judge can be aware of the
9 variations in demeanor and tone of voice that bear so heavily on
10 the listener's understanding of and belief in what is said."
11 Id. at 575.

12 V. DISCUSSION

13 Section 544(b) confers on bankruptcy trustees the power to
14 avoid any transfer of an interest of the debtor in property that
15 is voidable under nonbankruptcy law by a creditor holding an
16 allowable unsecured claim. Here, the "nonbankruptcy law" is
17 California's Uniform Fraudulent Transfer Act (CUFTA). "Whether
18 a transfer is avoidable under the [CUFTA] is a question purely
19 of California law as to which the California Supreme Court is
20 the final authority. Thus, a federal court construing the CUFTA
21 is merely predicting what the state supreme court would rule if
22 presented with the question." In re Beverly, 374 B.R. at 232.

23 **A. Constructive Fraudulent Transfer: The Trustee did not meet** 24 **his burden of proof regarding insolvency.**

25 Under Cal. Civil Code § 3439.05, a transfer is
26 constructively fraudulent if the debtor made the transfer
27 without receiving reasonably equivalent value in exchange and
28 the debtor was insolvent at that time or rendered insolvent as a

1 result of the transfer. Trustee must prove both reasonably
2 equivalent value and insolvency by a preponderance of evidence.¹⁰
3 In re GSM Wireless, Inc., 2013 WL 4017123, at *17 (Bankr. C.D.
4 Cal. April 5, 2013) (citing Whitehouse v. Six Corp., 40 Cal.
5 App. 4th 527, 533-34 (1995)).

6 **1. Insolvency**

7 Cal. Civil Code § 3439.02(a) provides that “[a] debtor is
8 insolvent if, at fair valuations, the sum of the debtor’s debts
9 is greater than all of the debtor’s assets.” This is the
10 balance sheet test for insolvency. Bay Plastics, Inc. v. BT
11 Comm. Corp. (In re Bay Plastics, Inc.), 187 B.R. 315, 328 n.22
12 (Bankr. C.D. Cal. 1995). Under Cal. Civil Code § 3439.02(c),
13 “[a] debtor who is generally not paying his or her debts as they
14 become due is presumed to be insolvent.” This is the cash flow
15 test for insolvency. In re Bay Plastics, 187 B.R. at 328 n.22.

16 As a general rule, solvency and not insolvency is presumed.
17 Neumeyer v. Crown Funding Corp., 56 Cal. App. 3d 178, 186
18 (1976). “To overcome the presumption of solvency, there must be
19 some basis in evidence for determining that the amount of the
20 debtor’s obligations exceeded the then present fair salable
21 value of his nonexempt assets.” Id. Here, because a statutory

22
23 ¹⁰ “The burden of showing something by a ‘preponderance of
24 the evidence,’ . . . ‘simply requires the trier of fact to
25 believe that the existence of a fact is more probable than its
26 nonexistence before [he] may find in favor of the party who has
27 the burden to persuade the [judge] of the fact’s existence.’”
28 Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension
Trust for So. Cal., 508 U.S. 602, 622 (1993). The preponderance
of the evidence standard “allows both parties to share the risk
of error in roughly equal fashion.” Herman & MacLean v.
Huddleston, 459 U.S. 375, 390 (1983).

1 presumption of insolvency did not apply, Trustee was required to
2 introduce evidence which by a preponderance proved Debtor's
3 insolvency at the time of the transfer. He did not.

4 At the outset, we disagree with Trustee's contention on
5 appeal that the bankruptcy court applied the "wrong" test for
6 insolvency under California law. As noted above, there are two
7 alternative tests to establish a debtor's insolvency under Cal.
8 Civil Code 3439.02 - the balance sheet test and the cash flow
9 test. The bankruptcy court found that Trustee had not proved
10 insolvency under either test.

11 As to the cash flow test, the court found: "And certainly,
12 the corporation satisfied the second [test], didn't it? They
13 continued in business and they paid their bills." In addressing
14 the balance sheet test, the court stated: "I looked at the
15 statements that were provided, I have heard the testimony of the
16 parties, as far as I am concerned, the corporation was also
17 solvent, if you look at the liabilities and assets." Since the
18 bankruptcy court considered both the balance sheet and cash flow
19 test, we review its factual findings on insolvency under the
20 clearly erroneous standard.

21 **a. The June 30, 2009 Balance Sheet**

22 To determine whether Debtor was solvent or insolvent on
23 June 30, 2009, the bankruptcy court considers the "fair
24 valuations" of the assets owned by Debtor and the amount of debt
25 that it owed. Cal. Civil Code § 3439.02(a). "This differs from
26 a balance sheet, where most assets apart from publicly traded
27 stocks and bonds are carried at historic cost, rather than
28 current market value." In re Bay Plastics, 187 B.R. at 330.

1 The resolution of the insolvency issue called for some relevant
2 and reliable information concerning the "fair valuation" of the
3 assets and outstanding liabilities on the critical date. Here,
4 there was none.

5 Trustee argues that the June 30, 2009 balance sheet
6 prepared by Mark conclusively proves that Debtor was insolvent
7 at the time of the transfer. In other words, Trustee relies on
8 the values set forth in the balance sheet to establish Debtor's
9 insolvency at the time of the transfer. Trustee accurately
10 points out that the balance sheet shows liabilities of
11 \$11,320,490.90 and assets of \$11,268,641.65. Thus, according to
12 these figures, Debtor was insolvent by at least \$51,849.25 on
13 the date of the transfer. Trustee also asserts that at his
14 deposition, Mark testified that Debtor was insolvent on the date
15 of the transfer. Mark testified: "The assets were - before the
16 transfer was \$11,268,641, and the total liabilities was
17 \$11,320,000, so they were upside-down roughly \$52,000."
18 Trustee's counsel then asked: "So on the date of the transfer,
19 its liabilities exceeded its assets by about \$52,000?" Mark
20 answered: "Yes, but because of the transfer, their assets
21 increased to \$524,000 and that doesn't include consideration for
22 the assumption of the lawsuit, the assumption of the built-in
23 gain risk." Essentially then, according to Trustee, Mark
24 admitted that Debtor was insolvent on the date of the transfer.
25 On these bases, Trustee asserts that he met his burden of
26 proving insolvency. We disagree.

27 As discussed below, the bankruptcy court correctly
28 concluded that the balance sheet was not sufficient to establish

1 Debtor's insolvency on June 30, 2009. First, Mark prepared the
2 balance sheet and he is not a financial expert. There is
3 nothing in the record that shows Mark was qualified to proffer
4 an opinion as to the true value of Debtor's assets or
5 liabilities on June 30, 2009. Even if he was, Mark did not
6 testify as to what valuation method was used in calculating the
7 "fair" value of the assets and liabilities placed on the balance
8 sheet. Nor did Douglass. Moreover, the only market values
9 shown on the balance sheet were those of the transferred assets.
10 The document is clear that only book value is used for any other
11 asset.

12 In addition, the bankruptcy court expressly did not find
13 the balance sheet reliable because, in the court's view, it was
14 more of a trial balance than a balance sheet.¹¹ Without the aid

15
16 ¹¹ Generally, a trial balance is an internal report that
17 will remain in the accounting department. It is a listing of all
18 of the accounts in the general ledger and their balances.
19 However, the debit balances are entered in one column and the
20 credit balances are entered in another column. Each column is
21 then summed to prove that the total of the debit balances is
22 equal to the total of the credit balances. In contrast, a
23 balance sheet is one of the financial statements that will be
24 distributed outside of the accounting department and is often
25 distributed outside of the company. The balance sheet is
26 organized into sections or classifications such as current
27 assets, long-term investments, property, plant and equipment,
28 other assets, current liabilities, long-term liabilities, and
stockholders' equity. Only the asset, liability, and
stockholders' equity account balances from the general ledger or
from the trial balance are then presented in the appropriate
section of the balance sheet. Totals are also provided for each
section to assist the reader of the balance sheet. The balance
sheet is also referred to as the statement of financial position
or the statement of financial condition. Harold Averkamp, What
is the difference between a trial balance and a balance sheet?

(continued...)

1 of Trustee's own expert as to what the proper assumptions were
2 underlying the numbers, the bankruptcy court had no persuasive
3 evidence before it as to the fair market values of Debtor's
4 assets and liabilities.

5 Second, Douglass' trial testimony raised doubts about the
6 accuracy of the balance sheet. He testified that Debtor's
7 assets would exceed its liabilities on June 30, 2009, if the
8 shareholder loans were removed from the liabilities portion of
9 the balance sheet. Although Douglass acknowledged that
10 shareholder loans were a liability that should be included in
11 the balance sheet, that statement was qualified: "If there is a
12 promissory note, then it should be included in the liability
13 section of the balance sheet." Douglass also testified that he
14 did not know if there were any promissory notes associated with
15 the shareholder loans. Accordingly, Douglass did not know
16 whether they should be included in the liabilities or not.¹²
17 Trustee offered no evidence to refute any of this testimony.

18 Third, Mark's trial testimony also raised questions about
19 the accuracy of the balance sheet that he had prepared. Mark
20 testified at trial that Debtor was "not insolvent."

21 Q. So different than what your deposition testimony
22 was?

23 A. I don't believe I used the word insolvent. I said
24 the balance sheet showed a minus \$52,000 on that
middle column, but there is a bunch of things that

25 ¹¹(...continued)

26 Accounting Coach, www.accountingcoach.com.

27 ¹² Douglass' testimony implied that if there was no evidence
28 of debt - i.e., a promissory note - shareholder "loans" would
instead be capital contributions.

1 weren't included in that.

2 Finally, Trustee complains that notably absent from the
3 balance sheet was any accounting for the potential liabilities
4 related to the construction defect claims against Debtor.
5 According to Trustee, this was error because disputed or
6 contingent liabilities must be included in calculating total
7 indebtedness for purposes of determining insolvency, citing
8 Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel,
9 Inc.), 96 B.R. 275, 279 (9th Cir. BAP 1989). There, the Panel
10 indicated that disputed or contingent liabilities must be
11 included in determining total indebtedness for purposes of an
12 insolvency analysis under § 547. The Panel also noted that
13 contingent debts must be reduced to reflect their present or
14 expected amount.

15 Although contingent liabilities are included in determining
16 total indebtedness for purposes of deciding insolvency, the
17 bankruptcy court's failure to include them here was not clearly
18 erroneous. The evidence shows that Debtor had no contingent
19 liabilities as of June 30, 2009, or if it did, they were
20 indefinite, speculative, and not material. Mark testified that
21 he did not receive Haney's demand letter and, as the bankruptcy
22 court noted, even if he had received the letter, it simply
23 threatened a lawsuit. Mark also testified that he thought the
24 matter with Harris was settled and that he was unaware of any
25 further litigation. Finally, Mark testified that as of June 29,
26 2009, he was not aware of any construction defect claims that
27 would pose a financial hardship to Debtor. In other words, even
28 if the construction defect litigation claims were pursued,

1 according to Mark, the anticipated magnitude of those claims was
2 not great.¹³ The bankruptcy court found Mark's testimony
3 credible.

4 When factual findings are based on determinations
5 regarding the credibility of witnesses, we give great
6 deference to the bankruptcy court's findings, because
7 the bankruptcy court, as the trier of fact, had the
8 opportunity to note 'variations in demeanor and tone
9 of voice that bear so heavily on the listener's
10 understanding of and belief in what is said.'

11 Anderson, 470 U.S. at 575. We thus defer to the bankruptcy
12 court's reasonable assessment of Mark's credibility.

13 In addition, even assuming such contingent liabilities
14 existed, Trustee provided no evidence that attempted to quantify
15 the amount of Debtor's likely liability on the construction
16 defect claims. Therefore, the bankruptcy court had no evidence
17 from Trustee showing that the construction defect litigation
18 would have rendered Debtor insolvent. For all these reasons,
19 the bankruptcy court did not clearly err by failing to include
20 contingent liabilities in its insolvency analysis.

21 In the end, given the uncertainties upon which the values
22 in the balance sheet were based, the bankruptcy court could
23 reasonably infer that it did not show by a preponderance of the
24 evidence that Debtor was insolvent on June 30, 2009. Trustee's
25 reliance on the balance sheet as conclusive evidence of
26 insolvency was misplaced.

27 **b. The 2009 Calendar Year Tax Return**

28 Next, Trustee points to Debtor's 2009 calendar year tax

29 ¹³ For example, if fifteen others had claims similar to
30 Harris' claims, each being worth \$2,000 in settlement, Debtor's
31 exposure would be no more than \$30,000.

1 return as conclusive evidence of Debtor's insolvency. Trustee
2 argues that Douglas testified at trial that the liabilities
3 shown on Schedule L of the return were reported incorrectly as
4 \$4,757,072, and that they should have been reported as
5 \$4,924,572, which exceeds Debtor's reported assets by \$167,502.
6 Trustee also contends that based on Debtor's consistent and
7 substantial losses from 2008 through 2010, the accompanying
8 negative retained earnings, and the reported liabilities in
9 excess of assets on the 2009 tax return, "it is implausible that
10 Debtor was solvent on June 30, 2009." Finally, Trustee
11 maintains that the court clearly erred in first believing that
12 the 2009 tax return reported assets in excess of liabilities and
13 then dismissing the mistake and focusing on the Debtor's
14 continuing business operations after the transfer. We are not
15 persuaded.

16 Although Douglass did testify that the liabilities on
17 Schedule L were added up incorrectly, Schedule L on the tax
18 return is irrelevant to the question of whether Debtor was
19 insolvent at the time it made the transfer for several reasons.
20 Douglass testified that in preparing Schedule L, his intent was
21 not to show insolvency but to report income and expenses.
22 Douglass also testified that the value assigned to the assets in
23 Schedule L did not reflect fair market values because the tax
24 return "typically reflects cost basis from the financial
25 statements. So whatever you see here was what the taxpayer
26 originally paid for the asset." Clearly then, Douglass'
27 preparation of the tax return had different goals than that of
28 an insolvency analysis. On this basis, the bankruptcy court

1 could reasonably conclude that Schedule L was not probative to
2 the question of whether Debtor was insolvent on the date of the
3 transfer.

4 Debtor's history of operating losses is also cited by
5 Trustee as evidence of insolvency. However, the bankruptcy
6 court correctly concluded that no useful inferences could be
7 drawn from those losses. The fact that Debtor operated at a
8 loss for a period of time is not an indication of the potential
9 value of the company.

10 **c. Presumption of Solvency**

11 Mark testified that after the June 30, 2009 transfer,
12 Debtor continued its operations and paid its debts. Because
13 Debtor continued to operate and pay its bills for almost three
14 years after the transfer, an inference of insolvency under Cal.
15 Civil Code § 3439.02(c) was not warranted. Therefore, it was
16 Trustee's burden, not the defendants', to prove insolvency by a
17 preponderance of the evidence.¹⁴

18
19 ¹⁴ At trial, the bankruptcy court designated Douglass as an
20 expert witness. Generally, Fed. R. Evid. 702 "requires that
21 expert testimony relate to scientific, technical, or other
22 specialized knowledge, which does not include unsupported
23 speculation and subjective beliefs." Guidroz-Brault v. Missouri
24 Pac. R. Co., 254 F.3d 825, 829 (9th Cir. 2001). In applying Fed.
R. Evid. 702, the trial judge must act as a gatekeeper to ensure
that the expert's testimony "rests on a reliable foundation and
is relevant to the task at hand." Daubert v. Merrell Dow Pharm.,
Inc., 509 U.S. 579, 597 (1993).

25 Here, Douglass opined in his declaration in lieu of direct
26 testimony that Debtor was solvent and generally paying its debts
27 as they became due. The bankruptcy court found Douglass'
28 testimony credible. However, the record does not show whether
Douglass' conclusion of solvency was based on tested assumptions
about the accuracy of values that had been placed internally on

(continued...)

1 The record shows that Trustee failed to satisfy that burden
2 or overcome the presumption of solvency as there was no reliable
3 evidence from which the court could reasonably infer that the
4 amount of Debtor's obligations exceeded the then present fair
5 salable value of its assets. Trustee did not offer evidence to
6 refute any of the testimony given by Douglass or Mark on the
7 issue of insolvency. Accordingly, based upon the preponderance
8 of the evidence presented, the bankruptcy court's ruling against
9 Trustee on the insolvency issue was not clearly erroneous.

10 **2. Reasonably Equivalent Value**

11 To make out a successful fraudulent transfer claim under
12 Cal. Civil Code § 3439.05, Trustee must show not only that
13 Debtor was insolvent at the time of the transfer, but also that
14 it failed to receive "a reasonably equivalent value in exchange
15 for the transfer." The Trustee having failed to prove
16 insolvency, a necessary element for a constructive fraudulent
17 transfer, it is unnecessary for us to reach this issue.

18 **B. Actual Fraudulent Transfer: The Trustee did not meet his 19 burden of proof regarding actual intent.**

20 Under the CUFTA, a transfer is intentionally fraudulent if
21 it is made with the intent to defeat, hinder or delay creditors.
22 Cal. Civil Code § 3439.04(a)(1) provides that transfers made
23 with actual intent to delay, hinder, or defraud creditors are
24 fraudulent and therefore voidable. Since direct evidence of

25
26 ¹⁴(...continued)
27 Debtor's assets or liabilities. Nonetheless, to the extent the
28 bankruptcy court erred in relying on Douglass' testimony, the
error was harmless because the record shows that Trustee did not
meet his burden of proof on insolvency.

1 intent to hinder, delay or defraud is seldom available, the
2 determination typically is made inferentially from circumstances
3 consistent with the requisite intent. In re Beverly, 374 B.R.
4 at 235 (citing Filip, 28 Cal. Rptr. 3d at 890).

5 The use of the "badges of fraud" to find intent is well-
6 established. Cal. Civil Code § 3439.04(b) sets out eleven non-
7 exclusive examples of events, acts, or statuses that may help
8 determine whether such actual fraud exists: (1) whether the
9 transfer or obligation was to an insider; (2) whether the debtor
10 retained possession or control of the property transferred after
11 the transfer; (3) whether the transfer or obligation was
12 disclosed or concealed; (4) whether before the transfer was made
13 or the obligation was incurred, the debtor had been sued or
14 threatened with suit; (5) whether the transfer was of
15 substantially all the debtor's assets; (6) whether the debtor
16 absconded; (7) whether the debtor removed or concealed assets;
17 (8) whether the value of the consideration received by the
18 debtor was reasonably equivalent to the value of the asset
19 transferred or the amount of the obligation incurred;
20 (9) whether the debtor was insolvent or became insolvent shortly
21 after the transfer was made or the obligation was incurred;¹⁵
22 (10) whether the transfer occurred shortly before or shortly
23 after a substantial debt was incurred; and (11) whether the
24 debtor transferred the essential assets of the business to a

25
26 ¹⁵ "Insolvency is but one of numerous factors a court has
27 discretion to consider in determining whether a party acted with
28 actual intent to defraud." Garcia v. Palmer, 2013 WL 6147111, at
*4 (Cal. Ct. App. Nov. 22, 2013). Proving insolvency is not a
requirement.

1 lienholder who transferred the assets to an insider of the
2 debtor.

3 Here, the bankruptcy court agreed with Trustee that some
4 badges of fraud were present: the transfers were made by
5 insiders and those insiders maintained control both before and
6 after the transfers. On appeal, Trustee argues that other
7 badges of fraud were present and, therefore, actual fraud was
8 proven.

9 Trustee's main focus is that Debtor had been sued and
10 threatened with suit prior to the transfer. According to
11 Trustee, while Mark testified that he did not receive Haney's
12 demand letter, both Mark and Nancy acknowledged at trial that
13 the letter was addressed to a location used by Debtor to store
14 its property and records and the transfer agreement identifies
15 the location as the place for closing the transfer. Trustee
16 maintains that the mailbox rule creates a rebuttable presumption
17 that documents duly served by mail have been received by the
18 addressee at the address stated in the proof of service under
19 Faden v. Segal (In re Segal), 2015 WL 400643, at *7 (9th Cir.
20 BAP Jan. 29, 2015). Trustee also argues that to overcome the
21 mailbox rule presumption, the party served ordinarily must
22 present something more than a bald denial of receipt and here
23 defendants did not produce anything other than a denial of
24 receipt. Finally, Trustee points out that he offered rebuttal
25 witness testimony from Adam Weiner that showed he was the
26 attorney of record for Debtor and spoke to Haney about the
27 demand letter.

28 In essence, Trustee attempts to reweigh the evidence in his

1 favor to suggest another outcome for this badge of fraud.
2 However, our role in this appeal is not to reweigh the evidence
3 presented to the bankruptcy court. Anderson, 470 U.S. at 575.
4 Putting the receipt of the letter aside, the bankruptcy court
5 stated that it was not convinced that the construction defect
6 litigation showed actual fraud for another reason. The court
7 opined that these types of suits were part of doing business:
8 "If you do business and you sell mobile homes, you will have
9 people complain about the type of mobile homes you had."
10 According to the court, if you are in business "you're always
11 going to be threatened with lawsuits. That doesn't mean very
12 much." Accordingly, in the court's view, Mark's receipt of the
13 demand letter was not dispositive evidence of actual fraud.

14 Trustee also argues that the transfer involved
15 substantially all of Debtor's assets. However, at trial, Mark
16 testified that Debtor did not lose all or substantially all of
17 its assets in the transfer. After the transfer, there were
18 assets remaining: "All the inventory items which consisted of
19 mobile homes and RV's and equipment, a lot of construction
20 equipment, and substantial notes receivable." This testimony
21 was not rebutted by Trustee at trial. Moreover, the balance
22 sheet identified many assets which were not transferred
23 representing more than half of the total book value of the
24 assets.

25 Finally, as noted above, although Trustee had not proved
26 Debtor was insolvent on the date of the transfer, proof of
27 actual fraud does not require proof of insolvency. Likewise,
28 even if Trustee had proved Debtor did not receive reasonably

1 equivalent value in exchange for the transfer, an issue which we
2 need not reach, this still would not necessarily add up to
3 actual fraud. As we previously observed:

4 The [C]UFTA list of 'badges of fraud' provides neither
5 a counting rule, nor a mathematical formula. No
6 minimum number of factors tips the scales toward
7 actual intent. A trier of fact is entitled to find
8 actual intent based on the evidence in the case, even
if no 'badges of fraud' are present. Conversely,
specific evidence may negate an inference of fraud
notwithstanding the presence of a number of 'badges of
fraud.'

9 In re Beverly, 374 B.R. at 236 (citing Filip, 28 Cal. Rptr. 3d
10 at 890); Annod Corp., 123 Cal. Rptr. 2d at 932-33 (court "should
11 evaluate all of the relevant circumstances involving a
12 challenged transfer" and "may appropriately take into account
13 all indicia negating as well as those suggesting
14 fraud. . . ."); see also Acequia, Inc. v. Clinton
15 (In re Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994)
16 (discussing actual fraud under § 548(a)(1): "The presence of a
17 single badge of fraud may spur mere suspicion; the confluence of
18 several can constitute conclusive evidence of actual intent to
19 defraud, absent 'significantly clear' evidence of a legitimate
20 supervening purpose.").

21 In short, many of the typical elements associated with an
22 actual fraudulent transfer are not present in this case. The
23 bankruptcy court considered Mark's explanation for the transfer
24 as a tax spinoff credible. This was sufficient, in the
25 bankruptcy court's mind, to rebut the circumstantial inference
26 of actual intent arising from the few badges of fraud that were
27 present. Accordingly, the bankruptcy court's factual finding
28 that Debtor had not made the transfer with actual fraudulent

1 intent was not clearly erroneous.

2 **VI. CONCLUSION**

3 Having found no error, we AFFIRM.

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