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NOT FOR PUBLICATION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

5	In re:)	BAP No.	EC-15-1312-TaJuD
6	SHAVER LAKEWOODS DEVELOPMENT)	Bk. No.	1:11-bk-62509
7	INC.,)	Adv. No.	1:14-ap-1076
8	Debtor.)		
9	VERLYN GAINES,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	RANDELL PARKER, Chapter 7)		
13	Trustee,)		
14	Appellee.)		

Argued and Submitted on June 23, 2016
at Sacramento, California

Filed - July 6, 2016

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

Honorable Fredrick E. Clement, Bankruptcy Judge, Presiding

Appearances: Robert H. Brumfield, III of Brumfield & Hagan,
LLP argued for Appellant; Lisa Anne Holder of
Klein Denatale Goldner Cooper Rosenlieb &
Kimball, LLP argued for Appellee.

Before: TAYLOR, JURY, and DUNN, 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 8024-1(c)(2).

1 **INTRODUCTION**

2 Appellant Verlyn Gaines appeals from a judgment determining
3 that he did not hold a secured lien against real property owned
4 by debtor Shaver Lakewoods Development, Inc. and subsequently
5 sold by the chapter 7¹ trustee.

6 We AFFIRM the bankruptcy court.

7 **FACTS**

8 Prepetition, Gaines provided lines of credit and other
9 financing to the Debtor in connection with the development of a
10 planned community in Shaver Lake, California. Although there
11 were no formal agreements in place, the parties generally agreed
12 that Gaines would be repaid from the proceeds of lots when
13 developed and sold. The Debtor subsequently sold or transferred
14 several of the lots clandestinely; Gaines received none of the
15 proceeds.

16 After Gaines' discovery of these transfers, the parties
17 addressed his obvious concern through an "Assignment of
18 Proceeds," followed by an amendment thereto (jointly, the
19 "Assignment"). Under the Assignment, the Debtor granted to
20 Gaines right, title, and interest in partial net sale proceeds
21 of 13 lots (collectively, the "Property"); specifically, Gaines
22 was to receive \$35,000 from each of the first six lot sales and
23 \$70,000 from each of the next seven lot sales, until Gaines
24 received payment in full of all amounts owed on account of the
25 loans and payment of a substantial finders fee.

26
27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 The use of the Assignment, as opposed to a trust deed, to
2 collateralize the Debtor's obligations to Gaines was a
3 considered choice. The Property was subject to an existing deed
4 of trust, and it contained a due on encumbrance acceleration
5 clause; the first position lender was entitled to require
6 immediate payment of the entire amount due on its note if the
7 Debtor allowed recordation of a junior lien on the Property.
8 And there was no question that the first position lender took
9 its acceleration rights seriously; it specifically warned the
10 parties that it would accelerate if Gaines recorded a trust
11 deed.

12 When executed, the Assignment included an attachment
13 describing the Property by legal description. After execution,
14 Gaines recorded the Assignment with the Fresno County recorder.
15 He failed, however, to perfect any personal property security
16 interest provided by the Assignment through a California
17 secretary of state filing.

18 The Debtor sold nine homes prepetition and paid Gaines as
19 provided by the Assignment.² The Trustee sold the remaining
20 homes after the Debtor filed its chapter 7 case.³ Gaines
21 asserted a secured claim in the bankruptcy case in the amount of
22 \$280,000, based on the Assignment, and claimed entitlement to

24 ² Indeed, Gaines signed partial releases with the title
25 company to obtain the funds.

26 ³ Instead of selling the remaining lots, the Debtor
27 transferred them to insiders and then filed for bankruptcy.
28 Once in bankruptcy, the Trustee recovered the transferred lots
pursuant to § 550 and obtained authorization to sell the lots
free and clear of the insiders' liens.

1 the postpetition lot sale proceeds. The Trustee thereafter
2 commenced an adversary proceeding against Gaines to determine
3 his entitlement, if any, to the proceeds of the postpetition
4 sales.

5 In his adversary complaint, the Trustee asserted that
6 Gaines did not have a lien against the sale proceeds enforceable
7 against the Trustee pursuant to §§ 544(a)(1)-(3) and 552 and
8 that the Assignment was not a lien against the Property; that
9 the Debtor's obligations to Gaines were barred by the California
10 statute of limitations as of the petition date; that the finders
11 fee was barred as a matter of law under California law because
12 Gaines was not a licensed broker; and that any debt owed to
13 Gaines was not secured by the sale proceeds of the Property.

14 Gaines sought declaratory relief by counterclaim; he
15 claimed a security interest in all sale proceeds of the Property
16 pursuant to the Assignment and asserted clear title to the lots
17 could not pass until he was paid. Gaines based his assertion of
18 a secured claim exclusively on an alleged lien encumbering the
19 Property itself; he expressly disclaimed any lien on personal
20 property. And he took this position consistently throughout the
21 bankruptcy case and now on appeal.

22 The bankruptcy court bifurcated the trial and first
23 determined whether the Assignment created a lien against the
24 Property securing Gaines' claim. After trial, it decided the
25 issue in favor of the Trustee. It found that the Assignment did
26 not describe the Property particularly as collateral or reflect
27 an intent to encumber it; instead, the Assignment provided a
28 security interest in the personal property proceeds from sale of

1 the Property. The bankruptcy court noted that Gaines expressly
2 disclaimed a lien against personal property. And the bankruptcy
3 court reached the obvious conclusion that Gaines failed to
4 perfect any personal property security interest, and, thus, any
5 personal property security interest was subject to set aside
6 under § 544.

7 Following entry of judgment in favor of the Trustee, Gaines
8 timely appealed.

9 JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b) (2) (A) and (K). We have jurisdiction under
12 28 U.S.C. § 158.

13 ISSUES

14 Whether the bankruptcy court erred in determining that the
15 Assignment did not create a lien against the Property and, thus,
16 that Gaines' claim was not secured by the Property.

17 STANDARDS OF REVIEW

18 We review the bankruptcy court's legal conclusions de novo.
19 See Los Angeles Cnty. Treasurer & Tax Collector v. Mainline
20 Equip., Inc. (In re Mainline Equip., Inc.), 539 B.R. 165, 167
21 (9th Cir. BAP 2015). Interpretation of the Assignment is
22 governed by California law. Under California law, we review
23 issues of contract interpretation de novo. See Speirs v.
24 Bluefire Ethanol Fuels, Inc., 243 Cal. App. 4th 969, 984 (2015).

25 We may affirm the decision of the bankruptcy court on any
26 basis supported by the record. See Hooks v. Kitsap Tenant
27 Support Servs., Inc., 816 F.3d 550, 554 (9th Cir. 2016).

28 ///

1 **DISCUSSION**

2 Gaines concisely advances three arguments on appeal: first,
3 that the Assignment gave rise to a mortgage under California law
4 and, thus, created a lien in his favor against the Property.
5 Second, that, in the alternative, an equitable mortgage existed
6 under California law, resulting in a lien against the Property.
7 And, third, that the Trustee was not a bona fide purchaser
8 because the Assignment was recorded.

9 The bankruptcy court determined that the Assignment did not
10 give rise to a mortgage against the Property. We agree.

11 In California, a mortgage is "a contract by which specific
12 property . . . is hypothecated for the performance of an act,
13 without the necessity of a change of possession." Cal. Civ.
14 Code § 2920(a). Here, a plain reading of the Assignment fails
15 to establish that the debt owed to Gaines would be secured by
16 the Property. Save for one immaterial reference,⁴ there is
17 absolutely no reference to security, collateral, pledge, lien,
18 or hypothecation of the Property itself.

19 This is not surprising; Gaines acknowledged that the
20 parties deliberately refrained from executing a traditional deed
21 of trust because of the first position lender's warning that a
22 junior trust deed would trigger the acceleration clause in the
23 senior trust deed. While a particular form is not required to
24 create a mortgage, it is axiomatic that the real property
25 hypothecated in the document must be clearly identified as

26
27 ⁴ Section 6 provides that "[t]he title to the Assigned
28 Proceeds has in no way been previously transferred in whole or
in part for the purpose of sale or **security**." (Emphasis added).

1 providing security for the subject debt.

2 Gaines argues that the Assignment clearly describes the
3 Property through the attachment containing a legal description
4 of the Property. But the Assignment's only reference to this
5 attachment is the following: "[The Debtor] owns and is
6 developing that certain real property known as Shaver Lake Woods
7 Development, (the 'Development'). The remaining unsold lots are
8 legally described in Exhibit 'A' attached hereto and
9 incorporated herein by reference as if fully set forth at
10 length[.]" This description may describe the Property, but it
11 does not delineate the collateral provided by the Assignment,
12 and, in isolation or in concert with the Assignment's clear
13 language, it falls short of a hypothecation of the Property
14 itself.

15 Instead, the Assignment reflects that Gaines obtained only
16 a security interest in the sale proceeds of the Property. This
17 is an interest in personal property, but Gaines expressly
18 disclaimed any such security interest both before the bankruptcy
19 court and on appeal. As a result, we need not and do not
20 consider his rights, if any, to a personal property secured
21 claim.

22 Gaines next argues, in the alternative, that the Assignment
23 created an equitable mortgage against the Property. In
24 California:

25 [E]very express executory agreement in writing,
26 whereby the contracting party sufficiently indicates
27 an intention to make . . . property . . . a security
28 for a debt or other obligation . . . creates an
equitable lien upon the property so indicated, which
is enforceable against the property in the hands not
only of the original contractor, but of his . . .

1 purchasers or encumbrancers with notice.
2 Clayton Dev. Co. v. Falvey, 206 Cal. App. 3d 438, 443 (1988).⁵
3 “[A] promise to give a mortgage or a trust deed on
4 . . . property as security for a debt will be specifically
5 enforced by granting an equitable mortgage.” Id. at 443. In
6 other words, “[a]n agreement that . . . property is security for
7 a debt also gives rise to an equitable mortgage even though it
8 does not constitute a legal mortgage.” Id. at 443-44. And,
9 importantly, “[s]pecific mention of a security interest is
10 unnecessary if it otherwise appears that the parties intended to
11 create such an interest.” Id.

12 Here, the parties were aware of the first position lender’s
13 intent to invoke the acceleration clause if a junior lien was
14 recorded against the Property. They crafted the Assignment to
15 circumvent this problem and by its plain language agreed not to
16 create a mortgage or a security interest in real property. This
17 was not an instance of mistake or defect. A litigant that seeks
18 equity must do equity. Gaines cannot now seek an equitable
19 mortgage, when the Assignment is inconsistent with his claim of
20 a lien on real property and when the mortgage he now seeks would
21 have constituted a knowing impingement on the contractual rights
22 of a third party.

24 ⁵ See also 5 Miller and Starr, Cal. Real Est. § 13:31 (4th
25 ed.) (“An ‘equitable mortgage’ is one that is created by a court
26 of equity rather than by the formal act of the parties. Under
27 certain circumstances, the court determines that equity,
28 fairness, and justice warrant enforcement of a security interest
between the parties despite the fact that no formal mortgage was
created or that an attempted creation was defective.”).

1 Given that the Assignment did not supply Gaines with a lien
2 against the Property and Gaines' affirmative abandonment of any
3 personal property secured claim, the bankruptcy court correctly
4 concluded that Gaines' claim was unsecured. Thus, we need not
5 and do not examine the issue of whether the Trustee was a bona
6 fide purchaser for the purposes of lien avoidance.

7 **CONCLUSION**

8 Based on the foregoing, we AFFIRM.