

MAR 15 2017

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-16-1041-LNTa
)
 CLIFFORD ALLEN BRACE, JR.,) Bk. No. 6:11-bk-26154-SY
)
 Debtor.) Adv. No. 6:11-ap-02053-SY
)

CLIFFORD ALLEN BRACE, JR.,)
 INDIVIDUALLY AND AS THE)
 TRUSTEE OF THE CRESCENT TRUST)
 DATED JULY 30, 2004; ANH N.)
 BRACE, INDIVIDUALLY AND AS)
 THE TRUSTEE OF THE CRESCENT)
 TRUST DATED JULY 30, 2004,)
)
 Appellants,)

v.) **MEMORANDUM***
)
 STEVEN M. SPEIER,)
 Chapter 7 Trustee,)
)
 Appellee.)

Argued and Submitted on January 19, 2017
at Pasadena, California

Filed - March 15, 2017

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

Honorable Scott Ho Yun, Bankruptcy Judge, Presiding

Appearances: Stephen R. Wade argued for appellants; Matthew W.
 Grimshaw of Marshack Hays LLP argued for appellee.

* 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.

1 Before: LAFFERTY, TAYLOR, and NOVACK,** Bankruptcy Judges.

2 **INTRODUCTION**

3 Pre-petition, Debtor formed a living trust, named his non-
4 debtor spouse as the sole beneficiary, and transferred into it
5 his interests in real properties formerly held by Debtor and his
6 spouse as joint tenants. At the time of the transfers, Debtor
7 was a defendant in state court litigation; a default judgment was
8 entered in that litigation shortly after the transfers. Debtor
9 and his spouse testified that the transfers were for her sole
10 benefit as part of long-contemplated estate planning, and from
11 the face of the relevant documents, the transfers to the trust
12 appeared to be for the sole benefit of Debtor's spouse. Post-
13 transfer, however, Debtor and his spouse ignored the stated
14 purpose of the transfers and continued to treat the trust
15 property as they had pre-transfer.

16 After Debtor filed his chapter 7¹ petition, the trustee
17 filed an adversary proceeding against Debtor and his non-debtor
18 spouse seeking to avoid the transfers under the California
19 Uniform Fraudulent Transfer Act ("CUFTA") and other theories.
20 After a one-day trial, the bankruptcy court entered judgment in
21 favor of the chapter 7 trustee. On reconsideration, the
22 bankruptcy court amended the judgment to clarify that while the

24 ** Hon. Charles Novack, United States Bankruptcy Judge for
25 the Northern District of California, sitting by designation.

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 avoidance of the transfers restored title to the Debtor and his
2 spouse as joint tenants, under the court's understanding of the
3 effect of California's presumptions involving the manner in which
4 married couples are deemed to hold real property, the properties
5 were community property. Consequently, the court determined that
6 the estate held the entire interest in all of the properties that
7 had been improperly transferred to the trust.

8 Debtor and his spouse appeal the bankruptcy court's findings
9 that the transfers were avoidable as actually fraudulent
10 transfers and that the estate has a deemed community property
11 interest in the recovered properties.

12 In this unpublished memorandum, we AFFIRM the decision of
13 the bankruptcy court with respect to its findings that the
14 transfers were avoidable as actually fraudulent transfers. In a
15 separate published opinion, we also AFFIRM the bankruptcy court's
16 ruling that the recovered properties were restored to community
17 property status and thus were fully recoverable by the bankruptcy
18 estate.

19 **FACTS**

20 **A. Pre-Petition Events**

21 Debtor and his non-debtor spouse, Anh N. Brace, were married
22 in 1972. Debtor is a real estate consultant with approximately
23 30 years of experience as a licensed real estate agent, broker,
24 and consultant. During the marriage, Appellants acquired their
25 residence in Redlands, California, a rental property in San
26 Bernardino, California, and a parcel of real property in Mohave,
27 Arizona (collectively, the "Properties"). Appellants took title
28 to each of the Properties as "husband and wife as joint tenants."

1 On July 30, 2004, Debtor formed the Crescent Trust. The
2 instrument creating the Crescent Trust states that it is an
3 irrevocable trust and that Debtor is the sole trustee; Ms. Brace
4 is the sole beneficiary of the trust. The trust instrument was
5 not recorded. Shortly thereafter, Debtor executed and had
6 recorded trust transfer deeds transferring his interests in the
7 Redlands and San Bernardino properties into the Crescent Trust
8 for no consideration. Additionally, the box on each deed was
9 checked indicating that the transfer was to a revocable trust.
10 Thus, although the unrecorded trust instrument for the Crescent
11 Trust appeared to place the trust assets out of the reach of
12 creditors, the public record reflected that the trust was
13 revocable and thus its assets were potentially subject to
14 execution by creditors and subject to disposition by the trustor.
15 See Laycock v. Hammer, 141 Cal. App. 4th 25, 29-30 (2006) (in
16 order to reach trust assets, creditor must show that trust was
17 revocable); Cal. Prob. Code § 18200.

18 For reasons that were not explained, Ms. Brace did not
19 transfer her interests in the Redlands and San Bernardino
20 properties into the Crescent Trust. Also, no deed transferring
21 the Mohave property was ever recorded, although Debtor testified
22 that such a deed was prepared. In the parties' joint pre-trial
23 statement, Appellants stipulated that the Mohave property was an
24 asset of the bankruptcy estate.

25 At the time of the transfers, Debtor was a defendant in
26 litigation in San Bernardino County Superior Court; a default
27 judgment in the amount of \$60,000 was entered against the Debtor
28 in that litigation approximately one month after the transfers

1 occurred.

2 After the Redlands and San Bernardino properties were
3 transferred into the Crescent Trust, Debtor and Ms. Brace
4 continued to live in the Redlands property; they also used those
5 properties to secure bail bonds in a criminal matter. Debtor
6 never filed tax returns for the Crescent Trust.²

7 **B. Post-Petition Events**

8 Debtor filed a chapter 7 petition on May 16, 2011, and
9 Robert L. Goodrich was appointed chapter 7 trustee ("Trustee").³
10 Debtor did not list any real property on Schedule A. At Debtor's
11 341 meeting, he testified that he had owned no real property in
12 the prior two years. He also testified that Ms. Brace owned no
13 property that was not listed in his schedules.

14 On December 15, 2011, Trustee filed an adversary proceeding
15 against Appellants, individually and in their capacities as
16 trustees of the Crescent Trust,⁴ seeking: a declaration that the
17 Properties were property of the bankruptcy estate; a judgment
18 quieting title to the Properties in the bankruptcy estate;
19 turnover of any of the Properties determined to be property of

20
21 ² At the time he formed the Crescent Trust, Debtor owned two
22 other parcels of real property, one in Palm Springs and the other
23 in Moreno Valley, which he held as his sole and separate
24 property. Concurrently with the formation of the Crescent Trust,
25 Debtor formed two additional trusts, the Cardillo Trust and the
Casilla Trust. Debtor transferred into those trusts his
interests in the Palm Springs and Moreno Valley properties,
respectively.

26 ³ Appellee Steven M. Speier was substituted as chapter 7
27 trustee after Mr. Goodrich resigned in December 2015.

28 ⁴ As noted, Ms. Brace is not a trustee of the Crescent
Trust.

1 the estate; and avoidance and recovery of Debtor's transfers of
2 the Redlands and San Bernardino properties into the Crescent
3 Trust as actually and/or constructively fraudulent transfers
4 under Cal. Civ. Code § 3439.04(a) (collectively, the "Fraudulent
5 Transfer Claims"); and revocation of Debtor's discharge under
6 §§ 727(d) (1) and (d) (2).

7 The bankruptcy court ordered the issues bifurcated for trial
8 pursuant to Civil Rule 42(b), applicable via Rule 7042, with the
9 Fraudulent Transfer Claims being tried before the revocation of
10 discharge claims. Trial was held on the Fraudulent Transfer
11 Claims on May 11, 2015. The witnesses were Debtor, Ms. Brace,
12 Trustee, and Burke Huber, an attorney who authenticated Debtor's
13 deposition testimony from a separate lawsuit. Direct testimony
14 was by declaration;⁵ Debtor, Ms. Brace, and Trustee were cross-
15 examined at trial. The bankruptcy court thereafter made oral
16 findings and conclusions in favor of Trustee on the actually
17 fraudulent transfer claim.

18 The bankruptcy court found: that the Crescent Trust was an
19 illegal trust and should be disregarded because Debtor had
20 created it for the sole purpose of defrauding creditors; that the
21 transfers of the Redlands and San Bernardino properties into the
22 Crescent Trust were actually fraudulent transfers; that the
23 Crescent Trust was Debtor's alter ego; that Ms. Brace was not a
24 good faith transferee; and that the Trustee was entitled to avoid
25 the unrecorded transfer of the Mohave property as a hypothetical

26
27 ⁵ The bankruptcy court sustained certain objections to the
28 declaration testimony. No party has assigned error to those
rulings.

1 bona fide purchaser under § 544. For all of these reasons, the
2 bankruptcy court concluded that the transfers of the Redlands and
3 San Bernardino properties into the Crescent Trust were avoidable
4 and recoverable by Trustee as property of the estate.

5 The court entered judgment on September 25, 2015. The
6 judgment provided that the Properties were property of the estate
7 and were to be turned over to Trustee. Defendants timely moved
8 to reconsider and amend the judgment, arguing that the judgment
9 should have provided that the Properties were owned one half by
10 Debtor and one half by Ms. Brace as tenants in common and that
11 only Debtor's interests in the Properties, and not Ms. Brace's,
12 were property of the estate. After oral argument, the bankruptcy
13 court issued its findings on the record, granting the motion to
14 reconsider in part: the bankruptcy court entered an amended
15 judgment clarifying that although the Properties were restored to
16 joint tenancy as a matter of title, they were community property
17 under California law and were thus property of the estate.

18 Appellants timely appealed.⁶

19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b)(2)(E), (H), and (J). We have jurisdiction
22 under 28 U.S.C. § 158.

23 ISSUES

24 A. Whether the bankruptcy court erred in finding that the
25

26 ⁶ Because the amended judgment did not dispose of all the
27 claims in the adversary proceeding, after this appeal was filed
28 the parties obtained a second amended judgment from the
bankruptcy court that contained a Rule 54(b) certification.

1 transfers of the Redlands and San Bernardino properties into the
2 Crescent Trust were actually fraudulent transfers.

3 B. Whether the bankruptcy court erred in finding that the
4 Crescent Trust was Debtor's alter ego.

5 C. Whether the bankruptcy court erred in finding that
6 Ms. Brace was not a good faith transferee.

7 **STANDARDS OF REVIEW**

8 We review the bankruptcy court's findings of fact for clear
9 error, and its conclusions of law de novo. Carrillo v. Su
10 (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). A finding is
11 clearly erroneous "when although there is evidence to support it,
12 the reviewing court on the entire evidence is left with the
13 definite and firm conviction that a mistake has been committed."
14 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)
15 (citation omitted). Where two permissible views of the evidence
16 exist, the factfinder's choice between them cannot be clearly
17 erroneous. Id. at 574. We are to give "due regard to the trial
18 court's opportunity to judge the witnesses' credibility." Civil
19 Rule 52(a)(6) (incorporated via Rule 7052). We also give
20 deference to inferences drawn by the trial court. Beech Aircraft
21 Corp. v. United States, 51 F.3d 834, 838 (9th Cir. 1995).

22 **DISCUSSION**

23 **A. The bankruptcy court did not err in finding that the**
24 **transfers of the Redlands and San Bernardino properties into**
25 **the Crescent Trust were avoidable as actually fraudulent**
transfers.

26 **1. The bankruptcy court correctly found that the transfers**
27 **were made with actual fraudulent intent.**

28 California Civil Code § 3439.04 provides:

1 (a) A transfer made or obligation incurred by a
2 debtor is voidable as to a creditor, whether the
3 creditor's claim arose before or after the transfer was
4 made or the obligation was incurred, if the debtor made
5 the transfer or incurred the obligation as follows:

6 (1) With actual intent to hinder, delay, or
7 defraud any creditor of the debtor.

8 The statute further provides that, in determining actual
9 intent to defraud, the court may consider the following factors:

10 (1) Whether the transfer or obligation was to an
11 insider.

12 (2) Whether the debtor retained possession or
13 control of the property transferred after the transfer.

14 (3) Whether the transfer or obligation was
15 disclosed or concealed.

16 (4) Whether before the transfer was made or
17 obligation was incurred, the debtor had been sued or
18 threatened with suit.

19 (5) Whether the transfer was of substantially all
20 the debtor's assets.

21 (6) Whether the debtor absconded.

22 (7) Whether the debtor removed or concealed
23 assets.

24 (8) Whether the value of the consideration
25 received by the debtor was reasonably equivalent to the
26 value of the asset transferred or the amount of the
27 obligation incurred.

28 (9) Whether the debtor was insolvent or became
insolvent shortly after the transfer was made or the
obligation was incurred.

(10) Whether the transfer occurred shortly before
or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential
assets of the business to a lienor that transferred the
assets to an insider of the debtor.

Cal. Civ. Code § 3439.04(b).

These eleven factors:

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

9 Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 236 (9th Cir.
10 BAP 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th
11 Cir. 2008) (citations omitted).

12 The bankruptcy court found that the presence of numerous
13 badges of fraud supported a finding that the Crescent Trust was
14 created for the purpose of defrauding creditors and thus was an
15 illegal trust that should be disregarded. Specifically, the
16 bankruptcy court found that the following factors supported a
17 finding of actual fraud: (1) the transfers to the Crescent Trust
18 were to an insider because Ms. Brace was the sole beneficiary of
19 the Crescent Trust; (2) the Debtor retained possession and
20 control of the transferred properties--he continued to live in
21 the Redlands Property, and Debtor used the San Bernardino
22 Property as collateral to post bonds for himself and a friend in
23 criminal matters; (3) the Debtor concealed the nature of the
24 transfers by claiming on the trust transfer deeds that the
25 properties were transferred into a revocable trust; (4) at the
26 time of the transfers the Debtor was a defendant in state court
27 litigation; (5) the Debtor removed or concealed the properties by
28 transferring them to the Crescent Trust; and (6) the Debtor
transferred the properties shortly before a substantial debt was
incurred, that is, the entry of the \$60,000 default judgment.

Appellants argue that the bankruptcy court's finding of

1 actual fraudulent intent was clearly erroneous because there was
2 no evidence that Debtor had notice of the state court lawsuit
3 which resulted in entry of the default judgment. Debtor
4 testified that he did not know of the lawsuit because he was not
5 personally served with the summons and complaint in that action,
6 which were served only by publication. Additionally, as
7 discussed below, Appellants contend that the transfers to the
8 Crescent Trust were done for estate planning purposes and to
9 memorialize the couple's longstanding agreement for Ms. Brace to
10 hold title to the Properties.

11 These arguments are not persuasive; they ignore the trial
12 court's function in assessing credibility of witnesses and this
13 Panel's duty to defer to that assessment, and they misconstrue
14 the rationale for the court's reliance on "badges of fraud" to
15 assess fraudulent intent.

16 As should be obvious, fraudulent intent is not readily
17 conceded and, for that reason among others, not easily proven.
18 In these instances, courts have access to two tools to assist
19 them in determining fraudulent intent: (1) assessment of a
20 witness's credibility via observing his or her demeanor and
21 testimony at trial, and (2) consideration of the "badges of
22 fraud" that provide essentially a checklist of the circumstances
23 that typically surround fraudulent acts.

24 **a. This Panel must defer to the trial court's findings**
25 **regarding credibility.**

26 At the outset of its ruling, the bankruptcy court observed
27 that neither Debtor nor Ms. Brace were credible witnesses. The
28 bankruptcy court noted that Debtor was "alert, educated, [and]

1 sophisticated" but that he had a "very selective memory": he had
2 good recall of events that were in his favor, but his memory
3 failed him when he was questioned by Trustee's counsel.
4 Regarding Ms. Brace, the bankruptcy court noted that she
5 testified "like she was reading a script that her husband or
6 someone gave her to say. But even then, she was neither
7 convincing nor credible."

8 We must defer to the bankruptcy court's credibility
9 determination to the extent it was based on the witnesses'
10 demeanor.

11 When factual findings are based on determinations
12 regarding the credibility of witnesses, we give great
13 deference to the bankruptcy court's findings, because
14 the bankruptcy court, as the trier of fact, had the
15 opportunity to note variations in demeanor and tone of
16 voice that bear so heavily on the listener's
17 understanding of and belief in what is said.

18 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir.
19 2010) (citing Anderson v. City of Bessemer City, 470 U.S. 564, 575
20 (1985)).

21 Moreover, there was ample evidence in the record to support
22 an inference that Debtor was not an honest individual: (1) Debtor
23 had a history of using multiple aliases that he did not disclose
24 in his bankruptcy petition; (2) at Debtor's 341 meeting, he
25 contradicted deposition testimony he gave in 2012 in state court
26 litigation; (3) Debtor pled guilty to forgery in 2010; and
27 (4) according to the declaration filed in the superior court in
28 support of the state court plaintiffs' request to serve
defendants by publication, plaintiffs made the request because,
in prior litigation against the same defendants, plaintiffs'
counsel had been unable to locate Debtor:

1 In the [prior lawsuit] . . . I never could find . . .
2 WALTER HARRIS or CLIFF BRACE and am not certain that
3 these are their real names. . . . I believe the WILSON
4 DEFENDANTS have set up P.O. Boxes, created false names,
5 and false entities in order to evade service. . . . I
6 am not certain that Defendants JUAN GARCIA, WALTER
7 HARRIS, NANCY NETTER, C. ALLEN, or CLIFF BRACE are even
8 real people. I have been unable to find any
9 information that they exist.⁷

10 In granting the request, the state court necessarily found that
11 defendants had a history of evading service, which warranted
12 service by publication.

13 Because there is nothing in the record to suggest that the
14 bankruptcy court's credibility determinations were erroneous, we
15 defer to those determinations.

16 **b. The bankruptcy court correctly applied the "badges of
17 fraud" to determine that the Debtor made the transfers
18 with actual intent to defraud creditors.**

19 Appellants claim that the trial court incorrectly determined
20 that the transfers were made with actual intent to defraud,
21 because there was no evidence that Debtor knew about the pending
22 state court claim at the time of the transfers. This assertion
23 is erroneous.

24 First, Appellants ignore the fact that the trial court found
25 that six separate badges of fraud were present with respect to
26 the challenged transfers and that only two related to the
27 existence of litigation: whether Debtor had been sued before the
28 transfer was made and whether the transfer occurred shortly
before a substantial debt was incurred. Thus, even if we agreed

⁷ Debtor admitted at trial that he had used the names
"C. Allen," "Robert Keller," and "David Walton" as aliases for
various purposes.

1 with Appellants that the trial court wrongly relied on the
2 existence of litigation, or the imminent entry of a judgment, as
3 badges of fraud, there was ample, and unchallenged, support in
4 the record for a finding of fraudulent intent; there are four
5 additional badges of fraud present here.

6 Second, and as noted above, the bankruptcy court need not
7 find the presence of a majority, or even any set number, of the
8 enumerated badges of fraud to conclude that a party likely
9 engaged in fraud. Rather, the court is entitled to conclude that
10 a party acted with actual intent to defraud creditors based on
11 the court's reasonable assessment of all the facts and
12 circumstances; the badges of fraud are merely a tool to assist in
13 that task.

14 Third, Debtor's premise that unless the court could
15 essentially demonstrate that the Debtor "knew" a fact that he
16 denied knowing, it could not conclude that he had acted with
17 fraudulent intent, requires exactly the sort of impossible
18 "seeing inside the debtor's conscience" that the legislature
19 sought to avoid by compiling the badges of fraud. To require
20 demonstrable certainty of a debtor's knowledge would completely
21 obviate the utility of consideration of circumstantial, and
22 reliable, evidence. See In re Beverly, 374 B.R. at 235 ("Since
23 direct evidence of intent to hinder, delay or defraud is
24 uncommon, the determination typically is made inferentially from
25 circumstances consistent with the requisite intent.") (citing
26 Filip v. Bucurenciu, 129 Cal. App. 4th 825, 835, 28 Cal. Rptr. 3d
27 884, 890 (2005)).

1 **c. The bankruptcy court was not required to believe**
2 **Debtor's wholly implausible explanation for the**
3 **transfers.**

3 Putting aside Debtor's courtroom demeanor and history of
4 deceptive practices, as well as the court's reliance on the
5 existence of numerous "badges of fraud," the bankruptcy court was
6 not required to believe Appellants' version of the reasons for
7 the transfers. Stated plainly, Appellants' testimony concerning
8 the background for and their motivations to conclude the
9 transfers was consistently implausible.

10 For example, Appellants' contention that the timing of the
11 subject transfers was merely the consummation of a longstanding
12 agreement between spouses to divide the couple's property would
13 require a finding that the timing of the transfers right before
14 judgment was entered against Debtor was purely and entirely
15 coincidental, and would require the court to ignore the numerous
16 suspicious circumstances surrounding the transactions.

17 In light of these circumstances, any argument in support of
18 Appellants' version of the rationale for these transaction would
19 have to be supported by the most indubitable evidence of their
20 innocent intent. Yet, Appellants offered nothing of any
21 genuinely probative, let alone persuasive, value. Appellants did
22 not present any documentation of the couple's plan to divide
23 their property, nor did they testify to an alternative catalyst
24 for the execution of that plan.

25 Moreover, there is nothing about the acquisition of the
26 Properties or the history of the financial arrangements between
27 Appellants as a married couple that would objectively support
28 their story that they "always intended" to hold the Properties

1 separately. There was no contention that the Properties were
2 acquired via inheritance or with separate funds, or any other
3 facts that would support a claim that the Properties should have
4 been categorized as separate property; to the contrary, it is
5 undisputed that the Properties were acquired with community
6 assets. Nor would the fact that the Appellants alternately paid
7 expenses of the Properties, depending on which of them was
8 gainfully employed at various points during the marriage,
9 described in greater detail in subsection C below, suggest a
10 different result. Indeed, it is the nature of a "community" that
11 a married couple acknowledges that they will pool their resources
12 to acquire and maintain property, and there is no requirement
13 that the contributions of the spouses be equal or available at
14 the same time.

15 We note also certain inconsistencies in the documentation of
16 the transactions that suggest an ulterior motive: first, despite
17 Debtor's vast experience in real estate matters, the trust
18 transfer deeds recited that the transfers were to a revocable
19 trust (rather than an irrevocable trust as set forth in the Trust
20 Agreement) and designated that Debtor was the sole grantee. Even
21 though the Properties were held by the couple as joint tenants,
22 there was no evidence that Ms. Brace ever transferred her
23 interests into the Crescent Trust. Debtor proffered no plausible
24 explanation for these inconsistencies, which suggest that Debtor
25 was focused on divesting himself of his interests in the
26 Properties and confusing the state of title to shield the
27 Properties from the impending judgment. And as discussed below,
28 even after the transfers, Appellants continued to treat the

1 Properties as their own.

2 In light of the foregoing, the bankruptcy court did not
3 clearly err in giving Debtor's testimony little to no weight in
4 finding that the transfers were made with actual fraudulent
5 intent. The court also supported its finding of fraudulent
6 intent by reference to numerous badges of fraud that accompanied
7 the transactions. Moreover, the court did not need to find that
8 Debtor knew about the litigation or to believe Debtor's highly
9 implausible "explanations" for his behavior. The finding of
10 actual intent to defraud is supported by the evidence and is not
11 clearly erroneous.

12 **B. The bankruptcy court did not err in finding that the**
13 **Crescent Trust was Debtor's alter ego.**

14 As an alternative theory for recovery of the Properties,
15 the bankruptcy court found that the Crescent Trust was Debtor's
16 alter ego. In determining whether the alter ego doctrine applies
17 to eliminate any distinction between an entity and an individual
18 controlling or dominating that entity, we apply the law of the
19 forum state. In re Schwartzkopf, 626 F.3d at 1037-38.
20 California courts have applied the alter ego doctrine to trusts.
21 Id. at 1038. Alter ego liability exists where two conditions are
22 met: (1) where there is such a unity of interest and ownership
23 that the separateness of the individual and the entity has
24 ceased; and (2) where adherence to the fiction of the separate
25 existence of the entity would sanction a fraud or promote
26 injustice. See id. Factors suggesting an alter ego relationship
27 include: (a) commingling of assets and failure to segregate
28 funds; (b) treatment by an individual of the assets of the

1 corporation as his own; (c) the disregard of legal formalities
2 and the failure to maintain arm's length relationships among
3 related entities; and (d) the diversion of assets from a trust by
4 or to another person or entity, to the detriment of creditors, or
5 the manipulation of assets between entities so as to concentrate
6 the assets in one and the liabilities in another. See id.

7 The bankruptcy court concluded that the Crescent Trust was
8 Debtor's alter ego based on its findings that (1) the trust was
9 formed for a fraudulent purpose; (2) Debtor treated the trust's
10 assets as his own; (3) Debtor disregarded legal formalities by
11 failing to file trust tax returns; and (4) by transferring real
12 property into the trust, Debtor manipulated assets so as to
13 concentrate the assets in one entity and the liabilities in
14 another.

15 Appellants contend that the bankruptcy court erred in
16 finding that the Crescent Trust was an illegal trust formed for
17 an improper purpose; thus, the second condition required for an
18 alter ego finding was not met. However, as discussed above, the
19 bankruptcy court did not err in that finding. Accordingly, we
20 find no error in the bankruptcy court's ultimate finding that the
21 Crescent Trust was Debtor's alter ego.

22 **C. The bankruptcy court did not err in finding that Ms. Brace**
23 **was not a good faith transferee.**

24 California Civil Code § 3439.08 states, "(a) A transfer or
25 obligation is not voidable under paragraph (1) of subdivision (a)
26 of Section 3439.04, against a person that took in good faith and
27 for a reasonably equivalent value given the debtor or against any
28 subsequent transferee or obligee." A defendant asserting the

1 existence of good faith has the burden of proof. Plotkin v.
2 Pomona Valley Imports, Inc. (In re Cohen), 199 B.R. 709, 718-19
3 (9th Cir. BAP 1996).

4 **1. Good faith**

5 It is not necessary that a defendant actually participate in
6 another's fraud, or even be completely aware of the fraud, to
7 fail to qualify as a good faith transferee. See id. at 719
8 (transferee lacks good faith if "possessed of enough knowledge of
9 the actual facts to induce a reasonable person to inquire further
10 about the transaction"). See also CyberMedia, Inc. v. Symantec
11 Corp., 19 F. Supp. 2d 1070, 1075 (N.D. Cal. 1998) (under UFTA, a
12 transferee lacks good faith if he or she (1) colludes with the
13 debtor or otherwise actively participates in the debtor's
14 fraudulent scheme, or (2) has actual knowledge of facts which
15 would suggest to a reasonable person that the transfer was
16 fraudulent).

17 The bankruptcy court found that although Ms. Brace had not
18 engineered the scheme to defraud, she participated in and
19 benefitted from the scheme:

20 [Ms. Brace] may not have been the one who engineered
21 this scheme to create the Crescent Trust and transfer
22 the Debtor's interest in the property to the trust, so
23 to defraud Mr. Brace's creditors. But she did not act
24 in good faith either. Maybe she didn't act in bad
25 faith, but she participated in the scheme; and even
26 though her testimony was conflicting, at best, she
27 continues to support her husband's attempt at
28 defrauding his creditors. So I don't believe she acted
in good faith.

26 Appellants argue that the bankruptcy court erred in finding
27 that Ms. Brace was not a good faith transferee because there was
28 no evidence that she was aware of any fraudulent intent on her

1 husband's part or that she had participated in the scheme.
2 Appellant's first point misapprehends the applicable standard--
3 the bankruptcy court did not need to find that Ms. Brace was
4 aware of Debtor's fraudulent intent. And there was evidence in
5 the record that Ms. Brace knew of and was complicit in the
6 transfers. Importantly, the bankruptcy court found not credible
7 Appellants' explanations for the transfers.

8 Debtor and Ms. Brace testified in their declarations that
9 the transfers into the Crescent Trust were part of an agreement
10 the couple made early in their marriage to keep their financial
11 affairs separate. Debtor testified that shortly after the couple
12 were married they purchased the San Bernardino Property as their
13 residence. Debtor further testified that while Ms. Brace was in
14 nursing school, Debtor made the payments on the residence, and
15 that after Ms. Brace became employed the payments were made from
16 the couple's joint checking account. According to Debtor,
17 virtually all of the funds in the joint checking account were
18 deposited by Ms. Brace because Debtor did not have regular income
19 at that time.

20 Debtor's testimony continued: sometime in the 1970s the
21 couple purchased the Redlands Property and made it their
22 residence; the couple agreed prior to 1978 that because Ms. Brace
23 had made the payments on the San Bernardino and Redlands
24 properties that those properties would belong to her.
25 Thereafter, in 2001 and 2004, respectively, Debtor purchased real
26 properties in Moreno Valley and Palm Springs, taking title as a
27 married man as his sole and separate property; Ms. Brace
28 relinquished her interests in those properties.

1 Debtor testified that he created the trusts for estate
2 planning purposes and to carry out the couple's agreement for
3 Ms. Brace to own the Redlands and San Bernardino properties as
4 her separate property and for Debtor to own the Moreno Valley and
5 Palm Springs properties as his separate property.

6 Ms. Brace testified in her declaration that the couple had a
7 longstanding oral agreement to keep their financial affairs
8 separate and that the San Bernardino and Redlands properties
9 would belong to Ms. Brace. She further testified that Debtor had
10 set up the Crescent Trust "to place his interest in my properties
11 into an irrevocable living trust to protect that interest for
12 me."

13 Our review of the record convinces us that the bankruptcy
14 court had ample reason to be skeptical of the Appellant's version
15 of the background to the transfers, and support for its
16 conclusion that Ms. Brace had not met her burden to show she was
17 a good faith transferee.

18 As an initial matter, we restate the point made earlier in
19 connection with the "actual intent to defraud" analysis, that the
20 bankruptcy court found both Debtor's **and Ms. Brace's** testimony to
21 be not credible. In particular, with respect to Ms. Brace's
22 testimony, the court stated that it was as if she were reading a
23 script that someone (i.e., her husband) had given her--and even
24 in this polished, scripted form, she was not at all convincing.

25 That conclusion was not only an appropriate exercise of a
26 trial court's prerogative in assessing credibility, it appears
27 entirely justified and accurate in light of Ms. Brace's testimony
28 on cross-examination, which repeatedly contradicted and

1 undermined the narrative presented in her declaration. On cross-
2 examination, Ms. Brace testified that she did not remember
3 hearing of the Crescent Trust, did not know why Debtor
4 transferred his interests in the Redlands and San Bernardino
5 properties into the Crescent Trust, and did not remember asking
6 Debtor to do so. Ms. Brace also testified that she did not
7 believe Debtor owed her money for the payments she had made on
8 the San Bernardino property mortgage or that she had paid a
9 disproportionate amount of the expenses on the Redlands property.

10 The repeated and striking disharmony between the scripted
11 narrative of Ms. Brace's declaration and the spontaneous and
12 apparently quite genuine answers she provided on cross-
13 examination not only raise troubling questions about her
14 credibility but eviscerate her claim to be a good faith
15 transferee. See Filip, 129 Cal. App. 4th at 836, 28 Cal. Rptr.
16 3d at 891 (affirming trial court's finding that defendant was not
17 a good faith transferee because defendant's testimony was not
18 credible).

19 That said, the evidence in the record supports the
20 bankruptcy court's finding that Ms. Brace participated in and
21 benefitted from the transfers. Although Ms. Brace gave
22 conflicting testimony regarding her knowledge of the transfers,
23 the bankruptcy court's choice among multiple plausible views of
24 the evidence cannot be clearly erroneous. See Anderson v. City
25 of Bessemer City, 470 U.S. 564, 573-75 (1985). Ms. Brace
26 testified that she was aware that her husband had set up the
27 Crescent Trust "to place his interest in my properties into an
28 irrevocable living trust to protect that interest for me." And

1 the transfers benefitted Ms. Brace because they effectively
2 conveyed to Ms. Brace her husband's interests in the transferred
3 properties. Although the bankruptcy court did not explicitly
4 find that Ms. Brace was possessed of enough knowledge to put a
5 reasonable person on inquiry notice, the record supports such a
6 finding. Ms. Brace knew about the transfers, and, as discussed
7 in subsection A.1.c. above, no plausible explanation was provided
8 for the timing of the transfers or the irregularities in the
9 documentation of the transactions, and Appellants continued to
10 treat the transferred properties as their own even after the
11 transfers. Under these circumstances, Ms. Brace was on notice
12 that Debtor may have had a fraudulent motive in making the
13 transfers.

14 For all of these reasons, the bankruptcy court did not err
15 in finding that Appellants had failed to meet their burden of
16 showing that Ms. Brace acted in good faith.

17 **2. Reasonably Equivalent Value**

18 The bankruptcy court correctly found that there was
19 insufficient evidence from which to make a finding that Ms. Brace
20 gave reasonably equivalent value for the transfers. The only
21 valuation evidence presented was Debtor's opinion testimony, to
22 which the bankruptcy court gave no weight: there was no basis to
23 conclude that Debtor was an expert in real property valuations,
24 and the bankruptcy court found implausible that Debtor knew
25 during the bankruptcy what the transferred properties were worth
26 in 2004.

27 Appellants argue that the undisputed fact that Debtor
28 obtained a \$240,000 credit line against his Palm Springs property

1 shortly after it was acquired supports an inference that the Palm
2 Springs property was worth an amount reasonably equivalent to the
3 approximately \$527,000 of equity transferred by Debtor to the
4 Crescent Trust. The bankruptcy court gave little weight to this
5 evidence, observing that in 2004 lending standards were more
6 relaxed, thus implicitly finding that any extrapolation of value
7 from the amount of the credit line would be inherently
8 unreliable.

9 Appellants argue that the bankruptcy court's observation
10 regarding 2004 lending standards was speculative and not
11 supported by evidence, but even if we were to disregard that
12 observation, we would not find error in the bankruptcy court's
13 conclusion. In fact, a finding of value of real property based
14 solely on the amount a lender would loan against it would
15 constitute speculation, as the amount that a particular lender
16 would loan is subject to a number of factors. More importantly,
17 the bankruptcy court rejected Debtor's opinion evidence of the
18 value of the Redlands and San Bernardino properties, making
19 impossible any finding as to whether Ms. Brace gave "reasonably
20 equivalent" value.

21 Therefore, we find no error in the bankruptcy court's
22 conclusion that Appellants failed to carry their burden of
23 proving a good faith transferee defense.

24 **CONCLUSION**

25 For these reasons, the bankruptcy court did not err in
26 concluding that the transfers into the Crescent Trust were
27 actually fraudulent, that the Crescent Trust was Debtor's alter
28 ego, or that Ms. Brace was not a good faith transferee.

1 Accordingly, we AFFIRM.

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