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

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-17-1102-FLKu
6	ISABEL TENORIO,)	Bk. No.	6:15-bk-21717-SC
7	Debtor.)	Adv. Pro.	6:16-ap-01022-SC
8	_____)		
9	MARIA C. PEREZ,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	LYNDA T. BUI, Trustee,)		
13	Appellee.)		
	_____)		

Argued and submitted on January 25, 2018
at Pasadena, California

Filed - February 8, 2018

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: Moises A. Aviles, Aviles & Associates, argued for
appellant Maria C. Perez; Brandon J. Iskander,
Shulman Hodges & Bastian LLP, argued for appellee
Lynda T. Bui, Trustee.

Before: FARIS, LAFFERTY, and KURTZ, 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.

1 **INTRODUCTION**

2 Less than two years before filing for bankruptcy protection,
3 chapter 7¹ debtor Isabel Tenorio ("Debtor") transferred her real
4 property to her longtime friend, appellant Maria C. Perez. The
5 chapter 7 trustee, Lynda T. Bui ("Trustee"), challenged the
6 transfer as an actual and constructive fraudulent transfer. The
7 bankruptcy court granted the Trustee summary judgment and ordered
8 turnover of the transferred property. We AFFIRM.

9 **FACTUAL BACKGROUND**

10 **A. The prepetition transfer**

11 This appeal involves the Debtor, the Debtor's close friend
12 of thirty-five years, Ms. Perez, and Ms. Perez's sister, Carmen
13 A. Aguayo. It also involves real property located in San
14 Bernardino, California (the "Property") and transfers of that
15 Property from Ms. Aguayo to the Debtor, and then from the Debtor
16 to Ms. Perez.

17 On or around November 18, 2010, the Debtor acquired the
18 Property via grant deed from Ms. Aguayo. Maverick Funding
19 Corporation ("Maverick") loaned the Debtor money to finance the
20 purchase and recorded a deed of trust against the Property
21 secured by a note in the amount of \$83,870.

22 Shortly thereafter, on December 4, 2010, the Debtor executed
23 a grant deed transferring the Property to Ms. Perez. The parties
24 did not record the grant deed, however, until three years later

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

1 on January 7, 2014. The Debtor did not receive any consideration
2 for the transfer to Ms. Perez.

3 There are many indications in the record that the Debtor
4 acted throughout for the benefit of Ms. Perez, and possibly Ms.
5 Aguayo too. The Debtor testified that she took out the mortgage
6 loan for Ms. Perez because Ms. Perez could not qualify for a
7 loan. Ms. Aguayo has continuously resided at the Property; the
8 Debtor stated that she has never lived at the Property, but she
9 occasionally stays at the Property on the weekends with Ms.
10 Aguayo.

11 According to the Debtor, Ms. Perez paid the mortgage loan on
12 the Property, even though the mortgage statements are addressed
13 to the Debtor. She and Ms. Perez are beneficiaries under the
14 homeowner's insurance policy effective August 2015. The Debtor
15 also claimed the mortgage interest deduction on her 2013 and 2014
16 tax returns.

17 **B. The Debtor's chapter 7 bankruptcy**

18 On December 2, 2015, approximately one year and eleven
19 months after the recordation of the transfer, the Debtor filed a
20 chapter 7 petition.

21 The Debtor disclosed personal property assets totaling
22 \$17,157 and no real property assets. She claimed personal
23 property exemptions totaling \$6,302. She identified \$87,559 in
24 secured debt and \$20,097 in unsecured credit card debt (including
25 an \$18,741 debt to Wells Fargo), for a total of \$107,656. She
26 indicated that her monthly income was \$2,109.

27 Even though the Debtor did not list any interest in real
28 property on her Schedule A, she identified the Property as her

1 residence on her petition and claimed a \$75,000 exemption on her
2 Schedule C. She identified Wells Fargo Home Mortgage as holding
3 a \$76,704 claim secured by "FHA Real Estate Mortgage" -
4 presumably a reference to the Property. On her statement of
5 financial affairs, she represented that she did not "sell, trade,
6 or transfer any property to anyone" within two years of the
7 petition date. She also did not disclose that she is a
8 beneficiary of the homeowner's insurance policy and affirmatively
9 represented that she did not have any interest in an insurance
10 policy, including homeowner's insurance.

11 She erroneously identified Ms. Perez as a codebtor and
12 disclosed a debt to Wells Fargo Home Mortgage. She stated,
13 "Debtor was unable to pay mortgage and transferred title to Maria
14 Perez who maintained mortgage payments since January 2014."

15 On her statement of financial affairs, the Debtor listed a
16 pending collection case against her filed by Wells Fargo Bank on
17 July 13, 2015 (presumably the same "credit card" debt held by "Wf
18 Crd Svc" that she disclosed as an unsecured debt). On April 5,
19 2016, Wells Fargo Bank filed a proof of claim in the amount of
20 \$18,741.96, based on a revolving line of credit opened on August
21 1, 1994.²

22 **C. The adversary complaint**

23 On February 3, 2016, the Trustee filed an adversary
24 complaint against Ms. Perez, seeking to avoid the transfer of the
25

26 ² According to the Trustee, this is the same debt that is
27 the subject of the Wells Fargo lawsuit; Wells Fargo did not
28 pursue the lawsuit after the Debtor filed for bankruptcy and
instead filed a proof of claim in the Debtor's bankruptcy case.

1 Property as a fraudulent transfer and recover the Property for
2 the estate. The Trustee alleged that the Debtor transferred the
3 Property to Ms. Perez within two years of her bankruptcy filing
4 and for no consideration. She alleged that the Debtor continues
5 to reside at the Property, that the Debtor does not pay rent to
6 Ms. Perez, that the mortgage loan on the Property is still in the
7 Debtor's name, that the Debtor took the mortgage interest
8 deduction in her 2013 and 2014 tax returns, and that the
9 homeowner's insurance policy was in the Debtor's and Ms. Perez's
10 names. The Trustee further alleged that the value of the
11 transfer (i.e., the equity in the Property) was approximately
12 \$128,000.³

13 The Trustee sought recovery of the Property and asserted
14 claims for intentional and constructive fraudulent transfer.
15 With regard to the intentional fraudulent transfer, the Trustee
16 alleged that the Debtor transferred the Property for the benefit
17 of an insider and for no consideration within four years of the
18 petition date and with the intent to hinder, delay, or defraud
19 her creditors. Regarding constructive fraudulent transfer, the
20 Trustee alleged that the Debtor was rendered insolvent by the
21 transfer and made the transfer to or for the benefit of an
22 insider.

23 **D. The motions for summary judgment**

24 Ms. Perez filed a motion for summary judgment and argued
25 that the Trustee could not establish an intentional or

26
27 ³ The Trustee asserted that the fair market value of the
28 Property was \$205,000 and the secured debt was \$76,400, for a
difference of approximately \$128,000.

1 constructive fraudulent transfer because "the transfer was an
2 interfamilial transfer, not a transfer to hide the Debtor's assets
3 in a fraudulent manner." In particular, Ms. Perez argued that
4 the Debtor was not insolvent after the transfer occurred because
5 the Debtor could pay her debts as they became due. Ms. Perez did
6 not attach a declaration by the Debtor as to her intent regarding
7 the transfer.

8 The Trustee also filed a motion for summary judgment
9 ("Motion"), arguing that the transfer was intentionally and
10 constructively fraudulent. She argued that summary judgment was
11 appropriate because there were no genuine issues as to any
12 material fact: "The Debtor has admitted she transferred the
13 Property, which constitutes substantially all of her assets, to a
14 friend of thirty-five years, for no consideration because she was
15 unable to pay the mortgage[,] but the Debtor "continues to enjoy
16 the Property on certain weekends, lists the Property as her
17 'principal residence' on her Petition, and claims a \$75,000.00
18 homestead exemption on the Property, all the while failing to
19 disclose the Transfer on her Statement of Financial Affairs."
20 She sought to avoid the transfer under § 544 and recover the
21 Property pursuant to § 550(a).

22 The Trustee argued that she proved the Debtor's actual
23 fraudulent intent under § 548(a)(1)(A) and California Civil Code
24 § 3439.04(a)(1) because seven badges of fraud were present:
25 (1) the transfer was made to an insider, a close friend of
26 thirty-five years; (2) the Debtor and Ms. Perez admitted that no
27 consideration was given in exchange for the transfer; (3) the
28 Debtor concealed the transfer by stating in her schedules that

1 she did not transfer any property to anyone within two years of
2 the petition date; (4) the Debtor retained the benefits of owning
3 the Property by staying at the Property on certain weekends;
4 (5) there were pending collection actions against the Debtor;
5 (6) the transfer was of substantially all of the Debtor's assets,
6 as her personal property was valued at \$17,157 (compared to the
7 Property, which the Debtor valued at \$150,000); and (7) the
8 Debtor became insolvent after the transfer. Regarding the
9 Debtor's insolvency, the Trustee argued that, under the balance
10 sheet test, the Debtor's debts totaling \$107,656 exceeded her
11 assets totaling \$17,157.

12 The Trustee also argued that the transfer was a constructive
13 fraudulent transfer under § 548(a)(1)(B) and California Civil
14 Code § 3439.05(a). She contended that: (1) the Debtor did not
15 receive reasonably equivalent value for the transfer because she
16 received no consideration; and (2) the Debtor was rendered
17 insolvent by the transfer.

18 **E. Hearing on the motions for summary judgment**

19 The bankruptcy court heard both summary judgment motions on
20 March 14, 2017. The court first considered the Trustee's Motion
21 and thoroughly examined the Trustee's list of twenty-three facts
22 that the Trustee thought were not subject to a genuine dispute
23 and Ms. Perez's arguments that five of those facts were disputed.

24 According to the Trustee's Fact #7, the Debtor transferred
25 the Property on January 7, 2014, based on the recordation of the
26 grant deed. Ms. Perez argued that the transfer took place on
27
28

1 December 4, 2010, the date the parties executed the grant deed.⁴
2 Based on California law, the court agreed with the Trustee and
3 held that the operative transfer date was January 7, 2014, which
4 was within two years of the December 2, 2015 petition date.

5 The Trustee's Fact #13 asserted that the Debtor maintained
6 the homeowner's insurance policy on the Property. Ms. Perez
7 disputed that fact and said that "both Debtor and [Ms. Perez] are
8 named on the insurance policy." The court stated that the
9 Debtor, Ms. Perez, and Maverick are beneficiaries under the
10 homeowner's policy. The court additionally stated that the
11 Debtor had failed to disclose her interest in the homeowner's
12 insurance policy in her schedules.

13 The Trustee's Fact #14 asserted that the Property was worth
14 \$205,000 (and had equity totaling \$128,000). Ms. Perez argued
15 that the Trustee's valuation of the Property was incorrect,
16 unsupported, and lacked foundation because the declaration of the
17 Trustee's real estate agent, Richard A. Halderman, did not
18 include appraisals or other documents supporting the valuation.
19 Mr. Halderman later provided a supplemental declaration (in
20 conjunction with the Trustee's reply brief) that explained the
21 reasoning behind his valuation of the Property. The court stated
22 that Mr. Halderman's supplemental declaration provided a
23 sufficient basis for his appraisal. The court further noted that

24
25 ⁴ At the hearing, Ms. Perez's special appearance counsel
26 initially argued that a transfer is deemed complete when the
27 parties execute the conveyance document, but later corrected
28 himself and stated that he was citing the wrong body of law.
Regardless, Ms. Perez's counsel argues on appeal that the
transfer occurred when the parties executed the grant deed.

1 the dispute over the fair market value may not matter because the
2 Debtor valued the Property in her schedules at \$150,000 and the
3 exact value was not a factor in the fraudulent transfer analysis.

4 The Trustee's Fact #16 asserted that the Wells Fargo
5 litigation existed at the time the Debtor filed her petition.
6 Ms. Perez did not deny this fact but stated that the case had
7 been dismissed without prejudice on October 28, 2016. The court
8 stated that Ms. Perez's reliance on the subsequent dismissal is
9 "an irrelevant contention" because the test is whether there was
10 "threatened litigation or act of litigation at the time of the
11 transfer, which was the recording" of the grant deed.

12 The Trustee's Fact #23 asserted that there were unsecured
13 creditors existing at the time of the transfer, as evidenced by
14 Wells Fargo Bank's proof of claim for \$18,741 based on a
15 revolving line of credit from 1994. Ms. Perez responded that the
16 litigation had been dismissed in state court. The bankruptcy
17 court disagreed, stating that the subsequent dismissal without
18 prejudice did not evidence that there were no creditors as of the
19 transfer.⁵

20 Having found no genuine issue of material fact, the
21 bankruptcy court considered the elements of the fraudulent
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23 ⁵ Additionally, the bankruptcy court stated that there was
24 no dispute that a creditor was in existence, because the Debtor
25 had also disclosed a \$76,704 secured debt held by Wells Fargo for
26 real property in Maryland. But there is no Maryland property;
27 the Maryland address identified by the court is Wells Fargo's
28 address, not the Debtor's property address. The supposed
Maryland debt in the schedules is an unclear reference to Wells
Fargo's mortgage loan secured by the Property. Neither party
corrected the court.

1 transfer claims. As to actual fraud and the badges of fraud laid
2 out in California Civil Code § 3439.04(b), the court stated:
3 (1) the Debtor and Ms. Perez are longtime friends; (2) the Debtor
4 retained possession or control of the Property post-transfer
5 because she was a beneficiary of the homeowner's insurance policy
6 and admitted that she retained an interest of \$150,000 in the
7 Property; (3) the Debtor did not disclose the transfer of the
8 Property on her bankruptcy filings and concealed the transfer;
9 (4) the Debtor transferred the Property after she had been sued
10 or threatened with a lawsuit; (5) the transfer represented
11 substantially all of her assets, whether the Property is valued
12 at \$150,000 or \$205,000; (6) it is unknown whether she removed or
13 concealed assets; (7) the Debtor did not receive any
14 consideration for the transfer; and (8) the Debtor became
15 insolvent shortly after the transfer. The court found actual
16 fraudulent intent by a preponderance of the evidence and granted
17 summary judgment against Ms. Perez.

18 Turning to constructive fraud under California Civil Code
19 § 3439.04(a)(2)(B), the court found that the Debtor did not
20 receive reasonably equivalent consideration and intended to incur
21 or believed or reasonably should have believed that she would
22 incur debts beyond her ability to pay. The court additionally
23 granted summary judgment in the Trustee's favor as to §§ 548 and
24 550. The court ordered that Ms. Perez turn over the Property to
25 the Debtor's bankruptcy estate.

26 Next, the bankruptcy court denied Ms. Perez's motion for
27 summary judgment for the same reasons it granted the Trustee's
28 Motion.

1 The bankruptcy court entered its order granting the
2 Trustee's Motion ("Summary Judgment Order"), holding that the
3 grant deed is a fraudulent transfer under § 548, is rendered void
4 and recovered under § 550, and is automatically preserved for the
5 benefit of the estate under § 551. Ms. Perez filed a timely
6 notice of appeal from the Summary Judgment Order.

7 **F. Sale of the Property and the motion to dismiss**

8 On May 10, 2017, Ms. Perez filed a motion for a stay pending
9 appeal.⁶ She argued that the Trustee was preparing to sell the
10 Property and that she and Ms. Aguayo would suffer irreparable
11 injury if the court did not stay proceedings pending the BAP
12 appeal. The Trustee opposed the motion.

13 Following a hearing, the bankruptcy court denied the motion
14 for a stay pending appeal. It held that Ms. Perez "has not met
15 her burden regarding likelihood of success on the merits. . . .
16 The arguments stated by the Defendant in this Motion were all
17 considered at the hearing, and were determined to be unfounded
18 and insubstantial." The court also held that Ms. Perez did not
19 prove that she would suffer irreparable harm and did not
20 articulate any public interest in support of a stay. Although
21 Ms. Aguayo may suffer irreparable harm with the loss of the
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23 ⁶ In support of her motion for a stay, Ms. Perez for the
24 first time included her declaration wherein she directly
25 addressed the issue of fraudulent intent. She stated that "I did
26 not receive the property in 2014 for any fraudulent intent." Ms.
27 Aguayo also stated in her declaration that "My sister did not
28 receive the property in 2014 for any fraudulent intent." But the
intention that matters is the transferor's, not the transferee's.
Ms. Perez did not include the Debtor's declaration concerning her
intent.

1 Property, the court concluded that the balance of the factors
2 weighed against granting a stay.

3 The Trustee filed before the BAP a motion to dismiss the
4 appeal as moot under § 363(m) ("Motion to Dismiss") because the
5 Property had been sold to Martha Medrano (who the bankruptcy
6 court determined was a good faith purchaser) and escrow had
7 closed on the sale of the Property. The Trustee argued that the
8 appeal was constitutionally moot because Ms. Perez had not
9 obtained a stay of the sale pending appeal and the Trustee had
10 already sold the Property to Ms. Medrano. She also contended
11 that the appeal was equitably moot because the Property had been
12 sold, the bankruptcy court had recognized the need for finality
13 of the sale, and Ms. Perez did not seek a stay from the BAP.

14 A BAP motions panel deferred decision on the Motion to
15 Dismiss for consideration with the merits of this appeal.

16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b) (2) (H). Subject to our discussion of mootness
19 below, we have jurisdiction under 28 U.S.C. § 158.

20 **ISSUES**

21 (1) Whether this appeal is moot.

22 (2) Whether the bankruptcy court erred in granting summary
23 judgment on the Trustee's actual and constructive fraudulent
24 transfer claims.

25 **STANDARD OF REVIEW**

26 We review de novo a bankruptcy court's decision to grant
27 summary judgment. Marciano v. Fahs (In re Marciano), 459 B.R.
28 27, 35 (9th Cir. BAP 2011), aff'd, 708 F.3d 1123 (9th Cir. 2013).

1 We also review de novo our own jurisdiction, including questions
2 of mootness. Silver Sage Partners, Ltd. v. City of Desert Hot
3 Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787
4 (9th Cir. 2003). “De novo review requires that we consider a
5 matter anew, as if no decision had been made previously.”
6 Francis v. Wallace (In re Francis), 505 B.R. 914, 917 (9th Cir.
7 BAP 2014).

8 DISCUSSION

9 A. This appeal is not moot.

10 We must first satisfy ourselves that this appeal is not
11 moot and that we have jurisdiction over this appeal. See Ellis
12 v. Yu (In re Ellis), 523 B.R. 673, 677 (9th Cir. BAP 2014) (“We
13 cannot exercise jurisdiction over a moot appeal.”). An appeal
14 is moot if events have occurred that prevent an appellate court
15 from granting effective relief. See Ederel Sport, Inc. v. Gotcha
16 Int’l L.P. (In re Gotcha Int’l L.P.), 311 B.R. 250, 253-54 (9th
17 Cir. BAP 2004). The “party moving for dismissal on mootness
18 grounds bears a heavy burden.” Motor Vehicle Cas. Co. v. Thorpe
19 Insulation Co (In re Thorpe Insulation Co.), 677 F.3d 869, 880
20 (9th Cir. 2012) (quoting Jacobus v. Alaska, 338 F.3d 1095, 1103
21 (9th Cir. 2003)).

22 The Trustee argues in her Motion to Dismiss that this appeal
23 is both constitutionally and equitably moot. Regarding
24 constitutional mootness, we have stated:

25 Constitutional mootness derives from Article III of the
26 United States Constitution, which provides that the
27 exercise of judicial power depends on the existence of
28 a case or controversy. The doctrine of constitutional
mootness is essentially a recognition of Article III’s
prohibition against federal courts’ issuing advisory
opinions. While the Article III mootness doctrine has

1 a "flexible character," it applies when events occur
2 during the pendency of the appeal that make it
3 impossible for the appellate court to grant effective
relief. If no effective relief is possible, we must
dismiss for lack of jurisdiction.

4 United States v. Gould (In re Gould), 401 B.R. 415, 421 (9th Cir.
5 BAP 2009), aff'd, 603 F.3d 1100 (9th Cir. 2010) (internal
6 citations omitted); see In re Thorpe Insulation Co., 677 F.3d at
7 880 (Whether a case is constitutionally moot turns on whether the
8 Panel may provide "the appellant any effective relief in the
9 event that it decides the matter on the merits in his favor.").

10 "Generally, a consummated sale to a third party who is not a
11 party to the appeal falls within this category. This is not,
12 however, an ironclad rule." Darby v. Zimmerman (In re Popp), 323
13 B.R. 260, 271 (9th Cir. BAP 2005) (citing Focus Media, Inc. v.
14 Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916,
15 922-23 (9th Cir. 2004)). The sale of the Property to Ms.
16 Medrano, a good-faith purchaser, does not necessarily prevent us
17 from granting any effective relief if we reverse the bankruptcy
18 court's Summary Judgment Order. There is no indication in the
19 bankruptcy court's docket that the Trustee distributed any of the
20 net sale proceeds to unsecured creditors. While we may not be
21 able to return the Property to Ms. Perez, we could fashion
22 "effective relief" by awarding her the net sale proceeds. See In
23 re Focus Media, Inc., 378 F.3d at 923 (holding that a case is not
24 constitutionally moot where fashioning equitable relief is not
25 impossible).

26 The Trustee also argues that the appeal is equitably moot.
27 Under the equitable mootness doctrine, we may "dismiss appeals of
28 bankruptcy matters when there has been a 'comprehensive change of

1 circumstances . . . so as to render it inequitable for this court
2 to consider the merits of the appeal.'" Rev Op Grp. v. ML
3 Manager LLC (In re Mortgs. Ltd.), 771 F.3d 1211, 1214 (9th Cir.
4 2014) (quoting In re Thorpe Insulation Co., 677 F.3d at 880).
5 "An appeal is equitably moot if the case presents 'transactions
6 that are so complex or difficult to unwind' that 'debtors,
7 creditors, and third parties are entitled to rely on [the] final
8 bankruptcy court order.'" Id. at 1215 (quoting In re Thorpe
9 Insulation Co., 677 F.3d at 880). To determine equitable
10 mootness, the Ninth Circuit has stated:

11 We will look first at whether a stay was sought, for
12 absent that a party has not fully pursued its rights.
13 If a stay was sought and not gained, we then will look
14 to whether substantial consummation of the plan has
15 occurred. Next, we will look to the effect a remedy
16 may have on third parties not before the court.
17 Finally, we will look at whether the bankruptcy court
18 can fashion effective and equitable relief without
19 completely knocking the props out from under the plan
20 and thereby creating an uncontrollable situation for
21 the bankruptcy court.

22 In re Thorpe Insulation Co., 677 F.3d at 881.

23 First, although Ms. Perez requested a stay from the
24 bankruptcy court, she did not seek a stay pending appeal from the
25 BAP. This would tend to indicate that she did not fully pursue
26 her rights to save the Property, despite knowing about the
27 impending sale. Second, the sale of the Property was completed,
28 but there is no evidence that the net sale proceeds have been
distributed. Third, as we noted above, we can grant Ms. Perez
relief without disturbing Ms. Medrano's rights. Lastly, the
bankruptcy court can fashion effective relief by compensating Ms.
Perez with some or all of the net sale proceeds. This case is
not so complex that we cannot unwind the transactions.

1 We hold that this appeal is not moot. We now turn to the
2 merits of this appeal.

3 **B. The bankruptcy court did not err in granting the Trustee**
4 **summary judgment on her fraudulent transfer claims.**

5 Based on the undisputed facts that Ms. Perez failed to
6 rebut, the bankruptcy court properly granted the Trustee summary
7 judgment.

8 **1. Summary judgment standard**

9 Civil Rule 56, made applicable in bankruptcy pursuant to
10 Rules 9014 and 7056, provides that summary judgment is
11 appropriate if "there is no genuine issue as to any material
12 fact," and if "the movant is entitled to judgment as a matter of
13 law." An issue is "genuine" only if there is an evidentiary
14 basis on which a reasonable fact finder could find in favor of
15 the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S.
16 242, 248 (1986). A dispute is "material" only if it could affect
17 the outcome of the suit under governing law. Id. At the summary
18 judgment stage, the court does not weigh the evidence and
19 determine the truth of the matter, but determines whether there
20 is a genuine issue for trial. Id. at 249.

21 Typically, the movant must present a prima facie case
22 establishing his entitlement to summary judgment. Once that
23 prima facie case has been established, the burden then shifts to
24 the non-moving party to establish the existence of a genuine
25 issue of material fact that would preclude entry of summary
26 judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 324
27 (1986). The non-moving party "must do more than simply show that
28 there is some metaphysical doubt as to the material facts" and

1 must "come forward with specific facts showing that there is a
2 genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith
3 Radio Corp., 475 U.S. 574, 586 (1986) (citation and quotation
4 marks omitted).

5 **2. Fraudulent transfer under state and federal law**

6 The Bankruptcy Code permits trustees to attack fraudulent
7 transfers under both federal and state law. Section 548 is a
8 comprehensive federal fraudulent transfer provision. In
9 addition, a trustee can employ state laws that provide for
10 transfer avoidance. Section 544(b)(1) authorizes a trustee to
11 avoid "any transfer of an interest of the debtor in property
12 . . . that is voidable under applicable law." See EPD Inv. Co.,
13 LLC v. Bank of Am. Corp. (In re EPD Inv. Co., LLC), 523 B.R. 680,
14 685 (9th Cir. BAP 2015).

15 The Trustee argues that the transfer was fraudulent under
16 § 548(a)(1) and the California Uniform Voidable Transfer Act
17 ("UVTA"), California Civil Code §§ 3439-3439.12. "To decide
18 whether a transfer is avoidable under California's [UVTA], we
19 must interpret California law." Ezra v. Seror (In re Ezra), 537
20 B.R. 924, 930 (9th Cir. BAP 2015) (citation omitted).

21 **a. Constructive fraud**

22 The bankruptcy court held that the Trustee established that
23 the transfer was a constructive fraudulent transfer because the
24 Debtor did not receive anything in exchange for the Property and
25 she became insolvent as a result of the transfer. Although the
26 bankruptcy court cited the wrong state statute, we agree with the
27 result.

28 The UVTA provides multiple types of constructive fraudulent

1 transfers. At the hearing on the motions for summary judgment,
2 the bankruptcy court looked at California Civil Code
3 §§ 3439.04(a)(2)(A) and (a)(2)(B). California Civil Code
4 § 3439.04(a)(2) provides that a transfer is voidable if the
5 debtor made the transfer:

6 Without receiving a reasonably equivalent value in
7 exchange for the transfer or obligation, and the
8 debtor either:

9 (A) Was engaged or was about to engage in a
10 business or a transaction for which the remaining
11 assets of the debtor were unreasonably small in
12 relation to the business or transaction.

(B) Intended to incur, or believed or reasonably
should have believed that the debtor would incur,
debts beyond the debtor's ability to pay as they
became due.

13 Cal. Civ. Code § 3439.04(a)(2). The court held that (a)(2)(A)
14 was inapplicable, but held that the Trustee had satisfied
15 (a)(2)(B).

16 However, § 3439.04(a)(2)(B) was inapplicable because there
17 was no evidence that the Debtor incurred or intended to incur any
18 new debt after the date of the transfer. Instead, the bankruptcy
19 court should have analyzed constructive fraud under California
20 Civil Code § 3439.05(a):

21 A transfer made or obligation incurred by a debtor is
22 voidable as to a creditor whose claim arose before the
23 transfer was made . . . if the debtor made the transfer
24 . . . without receiving a reasonably equivalent value
in exchange for the transfer . . . and the debtor was
insolvent at that time or the debtor became insolvent
as a result of the transfer

25 Cal. Civ. Code § 3439.05(a). Similarly, § 548(a)(1)(B) provides
26 that a transfer is constructively fraudulent if, within two years
27 of the petition date, the debtor "received less than a reasonably
28 equivalent value in exchange for such transfer . . . ; and . . .

1 was insolvent on the date that such transfer was made . . . , or
2 became insolvent as a result of such transfer. . . .”

3 Even though the bankruptcy court determined constructive
4 fraud under the incorrect state statute, it is harmless error.
5 We are able to determine readily from the record that the
6 transfer was constructively fraudulent under § 548(a)(1)(B) and
7 California Civil Code § 3439.05(a).

8 **i. Timing of the transfer**

9 The parties disagree as to when the transfer of the Property
10 occurred. Ms. Perez maintains that the transfer took place in
11 2010, when the Debtor and Ms. Perez executed the grant deed;
12 conversely, the Trustee argues that the parties transferred the
13 Property in 2014, when they recorded the grant deed.

14 The bankruptcy court correctly held that, as a matter of
15 law, January 7, 2014 was the operative date of the transfer. The
16 recordation date is the applicable transfer date under California
17 and federal law. See Ehring v. W. Cmty. Moneycenter (In re
18 Ehring), 91 B.R. 897, 900 (9th Cir. BAP 1988), aff'd, 900 F.2d
19 184 (9th Cir. 1990) (“the transfer of the real property interest
20 occurred when [the transferee] perfected its interest under state
21 law. . . . In California, perfection of a deed of trust occurs
22 upon the recordation of the document with the county recorder.”).
23 Accordingly, the transfer occurred when the parties recorded the
24 grant deed on January 7, 2014, which is within two years of the
25 December 2, 2015 petition date.

26 **ii. Reasonably equivalent value**

27 The bankruptcy court did not err in finding that the Debtor
28 received no consideration for the transfer and therefore did not

1 receive "reasonably equivalent value," whether the Property is
2 valued at \$150,000 or \$205,000. The UVTA provides that value is
3 given "if, in exchange for the transfer . . . , property is
4 transferred . . . , but value does not include an unperformed
5 promise made otherwise than in the ordinary course of the
6 promisor's business to furnish support to the debtor or another
7 person." Cal. Civ. Code § 3439.03.

8 Ms. Perez admitted that she did not pay the Debtor anything.
9 Rather, Ms. Perez tries to argue that because the Property was
10 previously owned by Ms. Aguayo, "it was more of an interfamily
11 [sic] transfer." This argument is nonsensical: many fraudulent
12 transfers are transfers among family members, and any familial
13 relationship between the parties has nothing to do with whether
14 value was given. It is undisputed that Ms. Perez did not
15 transfer any property in exchange for the Property.

16 **iii. Insolvency**

17 The undisputed facts show that the transfer of the Property
18 made the Debtor insolvent. Under the "balance sheet" test, her
19 debts outweighed her assets.

20 The Bankruptcy Code defines "insolvent" as a "financial
21 condition such that the sum of such entity's debts is greater
22 than all of such entity's property, at a fair valuation,
23 exclusive of . . . (i) property transferred, concealed, or
24 removed with intent to hinder, delay, or defraud such entity's
25 creditors; and (ii) property that may be exempted from property
26 of the estate under section 522 of this title[.]" § 101(32)(A).
27 California law also employs the same standard. Cal. Civ. Code
28 § 3439.02(a) ("A debtor is insolvent if, at a fair valuation, the

1 sum of the debtor's debts is greater than the sum of the debtor's
2 assets.").

3 This definition is the so-called "balance sheet" test. "In
4 an action to recover a preference or fraudulent transfer,
5 insolvency may be determined on the basis of a 'balance sheet'
6 test. This correlates with the definition of 'insolvent' in
7 § 101(32) that a corporation is insolvent if the sum of the
8 entity's debts is greater than all of the entity's property at a
9 fair valuation." Everett v. Thomas Capital Invs. (In re Pac.
10 Thomas Corp.), 543 B.R. 7, 13 (Bankr. N.D. Cal. 2015) (footnote
11 omitted); see Bay Plastics, Inc. v. BT Commercial Corp. (In re
12 Bay Plastics, Inc.), 187 B.R. 315, 330 (Bankr. C.D. Cal. 1995)
13 (The UVTA "adopt[s] the balance sheet test for insolvency: a
14 debtor is insolvent if the liabilities exceed the assets.").
15 Thus, both federal and state law agree that, under the "'balance
16 sheet' test[,] a debtor is insolvent when its liabilities exceed
17 its assets." Sierra Steel, Inc. v. Totten Tubes, Inc. (In re
18 Sierra Steel, Inc.), 96 B.R. 275, 277 (9th Cir. BAP 1989).

19 Ms. Perez argues that the Debtor was not insolvent and could
20 pay her creditors because she had approximately \$17,000 in
21 personal property assets post-transfer and earned approximately
22 \$2,100 per month. She contends that the Debtor had only \$1,037
23 of secured debt. But the comparison of the Debtor's assets to
24 her debts reveals a different story.

25 According to the Debtor's schedules,⁷ her assets (excluding
26

27 ⁷ Although the figures listed in the Debtor's schedules
28 might not reflect the Debtor's financial situation at the time of
the transfer nearly two years earlier, Ms. Perez did not object
to the Trustee's reliance on those figures. In fact, Ms. Perez's
(continued...)

1 the transferred Property) totaled \$17,157; her non-exempt
2 property totaled \$10,855. However, her debts (not including the
3 mortgage on the Property) exceeded \$30,000. These debts
4 consisted of a car loan and credit card debt, including an
5 \$18,741 debt to Wells Fargo that was the subject of the Wells
6 Fargo lawsuit and Wells Fargo's proof of claim. Therefore, the
7 Debtor's debts exceeded her assets.

8 Ms. Perez would have us ignore the Wells Fargo claim because
9 the state court dismissed Wells Fargo's lawsuit. But we have
10 previously held that a claim, even if disputed, is nevertheless a
11 "debt" for the purposes of considering a debtor's insolvency:

12 To the extent the bankruptcy court refused to consider
13 the \$300,000 claim only because it was a disputed or
14 unliquidated claim, its determination was erroneous. A
15 "debt" is defined as liability on a claim. 11 U.S.C.
16 § 101(11). A claim includes a right to payment, even
17 if it is contingent, unmatured, or not reduced to
judgment. 11 U.S.C. § 101(4)(A). Since claims may be
disputed or contingent, disputed or contingent
liabilities must be included in determining total
indebtedness for purposes of determining insolvency.
See 2 Collier on Bankruptcy ¶ 101.31[5].

18 In re Sierra Steel, Inc., 96 B.R. at 279. Moreover, the state
19 court dismissed the Wells Fargo lawsuit without prejudice, so the
20 dismissal did not affect Wells Fargo's underlying claim.
21 Accordingly, the bankruptcy court properly considered the Wells
22 Fargo claim in its calculation of the Debtor's debts.

23 Ms. Perez argues that the Debtor was solvent because her
24 \$2,100 monthly salary was sufficient to cover her secured debt
25 totaling \$1,037. But the "cash flow" test only supports a

26 _____
27 ⁷(...continued)
28 own calculations also rely on the information in the Debtor's
schedules. She thus has waived any argument that the Debtor's
financial condition on the date of the transfer was different
from the condition disclosed on the petition date.

1 presumption of insolvency: "A debtor that is generally not
2 paying the debtor's debts as they become due other than as a
3 result of a bona fide dispute is presumed to be insolvent. The
4 presumption imposes on the party against which the presumption is
5 directed the burden of proving that the nonexistence of
6 insolvency is more probable than its existence." Cal. Civ. Code
7 § 3439.02(b). The presumption does not work in reverse; in other
8 words, even if the Debtor were paying her debts as they became
9 due, she is not entitled to a presumption that she is solvent.

10 Therefore, although the bankruptcy court cited the wrong
11 state statute, it was harmless error because the undisputed facts
12 show that the Debtor was insolvent. The Trustee properly
13 established a constructive fraudulent transfer.

14 **b. Actual fraud**

15 The bankruptcy court also held that the transfer was an
16 actual fraudulent transfer. California Civil Code § 3439.04
17 defines an actual fraudulent transfer as one made: "With actual
18 intent to hinder, delay, or defraud any creditor of the debtor."
19 Cal. Civ. Code § 3439.04(a). Section 548(a)(1)(A) is
20 substantially similar: a transfer is void if, within two years
21 of the petition date, the debtor "made such transfer . . . with
22 actual intent to hinder, delay or defraud any entity to which the
23 debtor was or became, on or after the date that such transfer was
24 made . . . , indebted[.]" § 548(a)(1)(A).

25 As is almost always the case, the Debtor did not admit that
26 she transferred the Property to Ms. Perez with fraudulent intent.
27 (In fact, neither party offered any statement from the Debtor
28 about her intent.) The bankruptcy court properly considered

1 whether the circumstantial evidence established that the Debtor
2 intended to hinder, delay, or defraud her creditors. "Since
3 direct evidence of intent to hinder, delay or defraud is
4 uncommon, the determination typically is made inferentially from
5 circumstances consistent with the requisite intent." Wolkowitz
6 v. Beverly (In re Beverly), 374 B.R. 221, 235 (9th Cir. BAP
7 2007), aff'd in part, dismissed in part, 551 F.3d 1092 (9th Cir.
8 2008).

9 When determining the debtor's actual intent, courts may
10 consider certain "badges of fraud":

- 11 (1) Whether the transfer or obligation was to an
12 insider.
- 13 (2) Whether the debtor retained possession or control
14 of the property transferred after the transfer.
- 15 (3) Whether the transfer or obligation was disclosed or
16 concealed.
- 17 (4) Whether before the transfer was made or obligation
18 was incurred, the debtor had been sued or threatened
19 with suit.
- 20 (5) Whether the transfer was of substantially all the
21 debtor's assets.
- 22 (6) Whether the debtor absconded.
- 23 (7) Whether the debtor removed or concealed assets.
- 24 (8) Whether the value of the consideration received by
25 the debtor was reasonably equivalent to the value of
26 the asset transferred or the amount of the obligation
27 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

1 assets to an insider of the debtor.

2 Cal. Civ. Code § 3439.04(b).

3 "No single factor necessarily is determinative, and no
4 minimum or maximum number of factors dictates a particular
5 outcome. . . . [T]he list should not be applied formulaically.
6 Instead, the trier of fact should consider all of the relevant
7 circumstances surrounding the transfer." In re Ezra, 537 B.R. at
8 931 (citations omitted).

9 Both the Trustee and Ms. Perez relied exclusively on
10 circumstantial evidence of the Debtor's intent. Ms. Perez argues
11 that the Debtor did not intend to hinder, delay, or defraud her
12 creditors. She does not offer any declaration from the Debtor or
13 other direct evidence of the Debtor's intent; rather, she briefly
14 addresses each of the eleven factors enumerated above. The
15 bankruptcy court did not err.

16 First, Ms. Perez is an insider. The Debtor considered Ms.
17 Perez a "close friend" of thirty-five years whom she regarded
18 "like my family." This special relationship is sufficient to
19 cast Ms. Perez as an insider. See Kaisha v. Dodson, 423 B.R.
20 888, 901 (N.D. Cal. 2010) (a "long-time friend" with a "close
21 relationship" can be an insider); see generally Acequia, Inc. v.
22 Clinton (In re Acequia, Inc.), 34 F.3d 800, 806 (9th Cir. 1994)
23 (stating that insider status may be evidenced by "a special
24 relationship between the debtor and the transferee"). Further,
25 the Debtor admitted that she purchased the Property from Ms.
26 Aguayo and transferred it to Ms. Perez because she was close to
27 the women and wanted to help them.

28 Second, we agree with the bankruptcy court that the Debtor

1 retained an interest in the Property by virtue of her beneficiary
2 status on the homeowner's insurance policy. She also claimed the
3 mortgage interest deduction for at least two years on her tax
4 returns and lived in the Property on some weekends.

5 Third, the Debtor concealed the transfer of the Property.
6 She did not record the deed for over three years. When she filed
7 her bankruptcy papers, she did not disclose the transfer of the
8 Property and affirmatively stated that she had not transferred
9 any property within the past two years.

10 Fourth, Ms. Perez insists that the Debtor was not engaged in
11 or threatened by a lawsuit because the state court subsequently
12 dismissed the Wells Fargo lawsuit on October 28, 2016. The
13 Trustee argues that the Wells Fargo lawsuit was filed in July
14 2015, within a year and a half of the January 2014 transfer, and
15 that the Debtor stated that she intended on defaulting on her
16 Wells Fargo line of credit. Neither is correct; the dismissal of
17 the Wells Fargo lawsuit does not mean that the Debtor was
18 relieved of her debt to Wells Fargo, but the lawsuit was not in
19 existence "**before** the transfer was made or obligation was
20 incurred." Moreover, the Debtor's statement that she intended to
21 default on a debt does not necessarily mean that she was
22 threatened with a lawsuit. There is no evidence that the Debtor
23 was threatened with a lawsuit in January 2014. Although we
24 disagree with the bankruptcy court's analysis of this badge of
25 fraud, the un rebutted evidence concerning the other badges of
26 fraud is sufficient to support the court's conclusion.

27 Fifth, the transfer of the Property - whether valued at
28 \$150,000 or \$205,000 - constituted substantially all of the

1 Debtor's assets when compared to her personal property valued at
2 roughly \$17,000. Moreover, we agree with the court that Mr.
3 Halderman's declaration and supplemental declaration were
4 sufficient to establish the Property's value.

5 Sixth, we agree with Ms. Perez that the Debtor did not
6 abscond.

7 Seventh, just as the Debtor did not disclose the transfer,
8 she did not disclose the existence of the Property in her
9 bankruptcy filings.

10 Eighth, everyone admits that the Debtor did not receive any
11 consideration for the transfer.

12 Ninth, Ms. Perez argues that the transfer did not render the
13 Debtor insolvent, because she still had assets to pay off her
14 remaining creditors. But as discussed above, the Debtor's debts
15 outweighed her assets.

16 Tenth, the record does not show that the Debtor incurred a
17 substantial debt before or after the transfer.

18 Finally, the Property is not a business asset, so the
19 eleventh factor is inapplicable.

20 This is the unusual case in which summary judgment on an
21 actual intent fraudulent transfer claim was proper. Normally, it
22 is error to grant summary judgment on an issue of intent. But in
23 this case, Ms. Perez offered no declaration or other direct
24 evidence of the Debtor's intent. Nor did she offer any
25 interpretation of the circumstantial evidence that would support
26 a reasonable inference that the Debtor lacked an intent to
27 hinder, delay, or defraud creditors. We conclude that the
28 bankruptcy court did not err in finding, based on the badges of

1 fraud, that there were no genuine issues of material fact and
2 that the undisputed facts established that the Debtor possessed
3 an actual intent to defraud her creditors.

4 **CONCLUSION**

5 This appeal is not moot, and the bankruptcy court did not
6 err in granting the Trustee summary judgment on the constructive
7 and actual fraudulent transfer claims. We AFFIRM.

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