

MAY 07 2018

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	AZ-17-1162-BLKu
PHOENIX HELIPARTS INC.,	)	Bk. No.	2:15-bk-12003-DPC
Debtor.	)	Adv. No.	2:16-ap-00331-DPC
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ROBERT REISH; KATHLEEN REISH;	)		
RYUKO, INC.,	)		
Appellants,	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
PHOENIX HELIPARTS, INC.	)		
LIQUIDATION TRUST,	)		
Appellee.	)		
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Argued and Submitted on February 23, 2018,  
at Phoenix, Arizona

Filed - May 7, 2018

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Daniel P. Collins, Bankruptcy Judge, Presiding

Appearances: Appellants Robert Reish, Kathleen Reish and Ryuko, Inc., did not appear for argument; James E. Cross of Cross Law Firm, PLC argued for appellee Phoenix Heliparts, Inc. Liquidation Trust.

Before: BRAND, LAFFERTY and KURTZ, Bankruptcy Judges.

<sup>1</sup> 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 Appellants Robert Reish ("Reish"), Kathleen Reish, and Ryuko,  
2 Inc. appeal an order granting summary judgment to the liquidating  
3 trustee determining that a transfer of a helicopter from the  
4 debtor to Reish was an unauthorized postpetition transfer and  
5 ordering that the liquidating trustee recover from the Reishes the  
6 proceeds from the sale of the helicopter to a third party.  
7 Because we determine that the bankruptcy court applied an  
8 incorrect legal standard and, as a result, material questions of  
9 fact exist, we VACATE and REMAND for further proceedings.

## 10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### 11 A. Prepetition events

12 Phoenix Heliparts, Inc. ("PHP") was in the business of, among  
13 other things, purchasing and refurbishing wrecked or salvaged  
14 helicopters, bringing them back to airworthy status, then selling  
15 them at retail. Prior to the petition date, PHP was owned by  
16 three parties, including its former president, Tina Cannon.

17 Reish is a retired commercial airline pilot. Over the years,  
18 he purchased several helicopters from PHP. According to Reish,  
19 some helicopters were purchased for personal use while others were  
20 purchased for commercial use. In the past, Reish has donated  
21 flight services to various law enforcement agencies for search and  
22 rescue and reconnaissance for locating illegal drug farms. The  
23 Reishes own 100% of Ryuko, a Wyoming corporation, that was  
24 established to hold title to helicopters used for Reish's law  
25 enforcement-related efforts.

26 Two helicopters and a promissory note are at issue in this  
27 appeal:

28

1        MD Helicopter, Model 369FF, Serial No. 0041FF ("0041FF")

2        In 2009, PHP purchased the 0041FF from RotorMate USA. The  
3 original owner of the 0041FF, Utility Aviation, Inc., transferred  
4 the aircraft to XL Specialty Insurance Co., who transferred it to  
5 RotorMate USA, who then transferred it to PHP. When the 0041FF  
6 was owned by Utility Aviation, it was encumbered by a lien in  
7 favor of Wells Fargo.

8        On February 13, 2014, PHP and Reish executed a contract to  
9 sell the 0041FF to Reish for the "Base Project Price" of  
10 \$1,395,000. Reish was to make his first payment of \$500,000 by  
11 April 25, 2014. Reish paid an initial deposit of \$5,000 prior to  
12 the sales contract on December 16, 2013, when Cannon first offered  
13 him the 0041FF for purchase. The "Total" price and "Final  
14 Payment" date for the 0041FF was "TBD" (to be determined). The  
15 0041FF was to be delivered to Reish in an airworthy condition  
16 "F.O.B. Mesa, Arizona."

17        Since the 0041FF had been wrecked, PHP needed to make  
18 significant repairs before it could deliver it to Reish "with all  
19 systems operational, a current Airworthiness Certificate, Flight  
20 records up to date, all mandatory Airworthiness Directives and  
21 Service Bulletins complied with." The delivery date was to be  
22 approximately seven months after Reish paid his deposit and after  
23 the parties had agreed upon the scope of work. A bill of sale was  
24 also executed on the sale date, which would be delivered to Reish  
25 upon full payment of the purchase price.

26        Ultimately, PHP failed to complete the repairs required to  
27 render the 0041FF airworthy, and it was not delivered to Reish as  
28 agreed under the sales contract prior to PHP ceasing operations.

1 As late as September 2015, Reish was still pushing PHP to finish  
2 the 0041FF so he could sell it to another party. As of the date  
3 of the commencement of the adversary proceeding, the 0041FF was  
4 still not airworthy.

5 Although no party submitted documentary evidence to the  
6 bankruptcy court showing that PHP and Reish ever agreed upon a  
7 final scope of repairs or final sale price for the 0041FF, it is  
8 undisputed that by March 26, 2015, Reish had paid \$1,220,000 in  
9 cash to PHP towards his purchase of it. Reish stated at his Rule  
10 2004 examination that \$1,395,000 was the "Total" price, regardless  
11 of the "TBD" designation, and that if any scope of work on the  
12 0041FF did change after the contract was signed it did not add any  
13 additional cost to the project. Also, at times, Reish claimed  
14 that the 0041FF was purchased for personal use, but at other times  
15 indicated that it was purchased for commercial use. The court  
16 recognized this factual issue was in dispute.

17 MD Helicopter, Model 369D, Serial No. 1170229 (the "Delta")

18 PHP and Reish executed a contract on February 19, 2014, to  
19 sell the Delta to Reish for a total price of \$975,000. Reish paid  
20 the initial deposit of \$150,000 on the same date. At the time,  
21 the Delta was essentially a hull. The contract for the Delta  
22 contained the same terms regarding the delivery of an airworthy  
23 craft to Reish and place of delivery. It is undisputed that,  
24 prepetition, Reish had paid \$875,000 in cash to PHP for the Delta.  
25 At the time of PHP's bankruptcy filing, it was believed that the  
26 Delta was an incomplete shell, unable to fly, and that PHP was  
27 still in possession it.

28 ////

1           The Ryuko Note

2           Sometime in early 2015, Cannon approached Reish for a loan so  
3 PHP could fulfill an alleged project with Boeing. Reish agreed to  
4 loan PHP \$850,000. To get the \$850,000, Reish explained that he  
5 could sell investments worth \$1,275,000, but after payment of  
6 taxes only \$850,000 would be available to lend. Thus, PHP would  
7 have to pay back \$1,275,000 in exchange for the \$850,000.

8           On April 17, 2015, on behalf of PHP, Cannon executed an  
9 installment note ("Ryuko Note") in favor of "Ryuko, Inc., Trustees  
10 Robert C. Reish and/or Kathleen A. Reish" calling for payment by  
11 PHP of \$1,275,000 on or before April 1, 2016. Ryuko wired  
12 \$850,000 to PHP in connection with the Ryuko Note on April 21,  
13 2015. PHP never made any payments on the Ryuko Note.

14   **B. Postpetition events**

15           PHP filed its chapter 11<sup>2</sup> bankruptcy case on September 18,  
16 2015. The bankruptcy filing was precipitated by a January 2015  
17 state court judgment against PHP for \$26 million and the state  
18 court's subsequent order requiring PHP to post a supersedeas  
19 appellate bond for \$6,765,260.89. Neither Reish nor Ryuko was  
20 listed as a creditor in PHP's bankruptcy schedules or was  
21 otherwise notified of the bankruptcy case. Louie Mukai  
22 ("Trustee") was appointed chapter 11 trustee for PHP on  
23 October 22, 2015.<sup>3</sup>

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24  
25           <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27           <sup>3</sup> Mr. Mukai also later served as the liquidating trustee in  
28 PHP's case. We refer to him as "Trustee" throughout the rest of  
(continued...)

1           **1.     Sale of the 0041FF**

2           After PHP's bankruptcy filing and Trustee's appointment,  
3 Cannon, without permission from Trustee or the court, orchestrated  
4 a sale of the 0041FF to the Azerbaijan Ministry of Defense  
5 ("AMOD"). Because PHP and RotorMate had failed to properly  
6 document PHP's 2009 purchase of the 0041FF, Cannon arranged for  
7 title to the 0041FF to finally be transferred from RotorMate to  
8 PHP and for the Wells Fargo lien to be released. Then Cannon  
9 transferred title to the 0041FF from PHP to Reish and facilitated  
10 the transfer of the 0041FF from Reish to AMOD on November 11,  
11 2015. AMOD agreed to pay \$2,322,000 for the 0041FF, but wired  
12 only \$2,150,000 to Reish. No evidence was submitted indicating  
13 why AMOD transferred only \$2,150,000 to Reish, or if AMOD ever  
14 paid Reish the remaining agreed purchase price. On November 25,  
15 2015, AMOD, through its legal counsel, executed an unconditional  
16 acceptance of the 0041FF in its condition as of that date.<sup>4</sup>

17           Reish was not aware of PHP's bankruptcy when the sale of the  
18 0041FF to AMOD took place in November 2015. He eventually learned  
19 of PHP's bankruptcy filing in January 2016. The bankruptcy court  
20 deemed the Reishes' and Ryuko's five untimely proofs of claim as  
21 timely, given the lack of notice. Trustee objected to all five  
22 claims, but those matters are not at issue in this appeal.

23           **2.     Creation of the Liquidation Trust**

24           Thereafter, the bankruptcy court entered orders approving the

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26           <sup>3</sup>(...continued)  
the Memorandum.

27           <sup>4</sup> Despite the sale to AMOD, the Liquidation Trust still  
28 possesses the 0041FF.

1 sale of most of PHP's assets and confirming a plan of liquidation.  
2 The plan created the PHP Liquidation Trust and appointed Trustee.  
3 The Liquidation Trust was vested with all unadministered assets of  
4 PHP, including the rights to pursue avoidance and turnover  
5 actions.

6 **3. Reish's adversary complaint and the parties' summary**  
7 **judgment motions**

8 Reish filed an adversary complaint against the Liquidation  
9 Trust, seeking a determination of the nature, extent and validity  
10 of his interest in the 0041FF and the sale proceeds thereof and  
11 the nature of his interest in the Delta. Reish sought a  
12 declaration confirming that he owned the 0041FF, which he asserted  
13 was never property of the estate, and that he owned the \$2,150,000  
14 in sale proceeds.

15 Trustee filed his answer and counterclaims against the  
16 Reishes under §§ 549 and 550, and a counterclaim against counter-  
17 defendant Ryuko under § 548. In the counterclaims against the  
18 Reishes, Trustee sought to avoid the transfer of the 0041FF, which  
19 he contended was estate property when PHP filed its bankruptcy  
20 case, and to recover \$2,322,000 – the value of the 0041FF at the  
21 time of the sale to AMOD. Trustee also sought a determination  
22 that the Delta was estate property.

23 Thereafter, Trustee moved for summary judgment on his  
24 counterclaims ("MSJ"). He argued that the only issue regarding  
25 the 0041FF was the date title transferred to Reish and whether it  
26 was before or after the petition date. Trustee argued that, under  
27 the sales contract, three things had to occur for both parties to  
28 have performed under the agreement: (1) full payment by Reish;

1 (2) issuance of a Certificate of Airworthiness evidencing that the  
2 0041FF was fully repaired; and (3) delivery of an FAA Bill of Sale  
3 transferring title to Reish.

4 Trustee argued that, because the FAA Bill of Sale to Reish  
5 was not drafted until October 27, 2015, and because neither party  
6 performed their obligations prior to PHP's bankruptcy filing,  
7 title for the 0041FF did not transfer to Reish prior to the  
8 bankruptcy filing on September 18, 2015, and therefore the 0041FF  
9 was estate property on the petition date. Thus, the unauthorized  
10 transfer to Reish was a postpetition transfer avoidable under  
11 § 549. Because the value of the 0041FF was \$2,322,000 on the date  
12 it was sold to AMOD, Trustee argued that the Liquidation Trust  
13 could recover that amount under § 550.

14 The Reishes and Ryuko opposed the MSJ and the Reishes filed a  
15 cross-motion for summary judgment. They argued that no basis  
16 existed to avoid the transfer of the 0041FF because it was a  
17 consumer goods purchase and therefore was never estate property as  
18 a matter of Arizona law. Specifically, the Reishes argued that  
19 they had a "special property interest" in the 0041FF, which arose  
20 on the contract formation date of February 13, 2014, and was  
21 superior to the Liquidation Trust's interest. The Reishes  
22 maintained that they had paid for the 0041FF in full prior to the  
23 petition date between cash payments and an "offset credit" of  
24 \$175,000 on the Ryuko Note applied the day the \$850,000 in Ryuko  
25 loan funds were wired to PHP.

26 In reply, Trustee maintained that no documentary evidence  
27 supported the contention that an "offset credit" of \$175,000 was  
28 applied to the 0041FF. Trustee also contended that the Reishes'

1 claim that the 0041FF was purchased for personal use was  
2 contradicted by their proof of claim charging for lost rents. In  
3 any event, Trustee argued that the 0041FF was estate property on  
4 the petition date and even if the Reishes had a special property  
5 interest in it prepetition it was subject to the estate's  
6 interest.

7 The bankruptcy court entered its under advisement ruling  
8 partially granting the MSJ and denying the Reishes' cross-motion  
9 and dismissing their complaint with prejudice. In summary, the  
10 court found that the 0041FF and the Delta were estate property  
11 and, because the postpetition transfer of the 0041FF to Reish was  
12 an avoidable transfer, Trustee could recover from the Reishes the  
13 sale proceeds of \$2,150,000. The court denied the MSJ as to the  
14 Liquidation Trust's claim against Ryuko under § 548 to avoid all  
15 but the \$850,000 of the Ryuko Note as a fraudulent transfer.<sup>5</sup>

16 To reach its decision, the bankruptcy court determined that  
17 no valid setoff of \$175,000 occurred to finish satisfying Reish's  
18 purchase price for the 0041FF because mutuality of the parties was  
19 lacking; Reish could not apply a credit of \$175,000 owed to Ryuko  
20 for a Reish project such as the 0041FF. The same was true for the  
21 Delta and the alleged \$100,000 setoff. Alternatively, the court  
22 found that even if there were setoffs for the 0041FF and the  
23 Delta, and that Reish had fully paid for them prepetition, both  
24 aircraft nonetheless remained property of PHP and, subsequently,  
25 of the Liquidation Trust. The court also determined that Reish  
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27 <sup>5</sup> Trustee has not cross-appealed the court's award of only  
28 \$2,150,000 or its ruling on the Liquidation Trust's claim against  
Ryuko. Therefore, we do not address these issues.

1 never had a "special property interest" in either aircraft because  
2 they were not "goods" within the meaning of ARS § 47-2105(B);  
3 rather, they were only "future goods." Thus, no "special property  
4 interest" arose and Trustee's hypothetical lien under § 544 was  
5 superior to any interests Reish could assert against either  
6 aircraft.

7 The bankruptcy court entered an order partially granting the  
8 MSJ ("MSJ Order"), which provided that under Rule 7054 there was  
9 no just reason for delay in the entry of a final judgment as to  
10 the claims and parties.

11 This timely appeal followed.

## 12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
14 and 157(b)(2)(H) & (K).<sup>6</sup> We have jurisdiction under 28 U.S.C.  
15 § 158.

## 16 **III. ISSUES**

- 17 1. Did the bankruptcy court have subject matter jurisdiction
- 18 over the Delta?
- 19 2. Did the bankruptcy court err in determining that Reish did
- 20 not have a special property interest in the 0041FF?
- 21 3. Did the bankruptcy court err in granting the MSJ?

## 22 **IV. STANDARDS OF REVIEW**

23 We review de novo questions of subject matter jurisdiction.  
24 Montana v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1193  
25 (9th Cir. 2005).

26 Whether property is included in a bankruptcy estate is a

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27 <sup>6</sup> To the extent the bankruptcy court lacked jurisdiction, we  
28 discuss that issue below.

1 conclusion of law reviewed de novo. Groshong v. Sapp (In re MILA,  
2 Inc.), 423 B.R. 537, 542 (9th Cir. BAP 2010).

3 We review the bankruptcy court's interpretation of the Code  
4 and of state law de novo. Hopkins v. Cerchione (In re Cerchione),  
5 414 B.R. 540, 545 (9th Cir. BAP 2009).

6 We review the bankruptcy court's decision to grant partial  
7 summary judgment de novo. Guerin v. Winston Indus., Inc., 316  
8 F.3d 879, 882 (9th Cir. 2002).

## 9 V. DISCUSSION

### 10 **A. The bankruptcy court lacked subject matter jurisdiction over** 11 **the Delta.**

12 While this appeal was pending, the parties learned that the  
13 Delta had been made airworthy and was sold prepetition on  
14 April 30, 2015, by PHP to a party named Winco, a bona fide  
15 purchaser. Trustee concedes that, due to this prepetition sale,  
16 the Delta was never property of the estate or the Liquidation  
17 Trust. The Reishes argue, however, that this does not moot the  
18 issue of ownership interests the bankruptcy court determined for  
19 the Delta. Trustee did not respond to this argument.

20 The bankruptcy court ruled that the Delta was estate property  
21 and that the Reishes had no interest in it. However, since the  
22 undisputed facts demonstrate that the Delta was never property of  
23 the estate, the court lacked subject matter jurisdiction to make  
24 any rulings as to this aircraft. Thus, any determinations the  
25 court made with respect to the Delta are VOID. See Ministry of  
26 Def. & Support for the Armed Forces v. Cubic Def. Sys., 385 F.3d  
27 1206, 1226 (9th Cir. 2004) (a judgment is void if the issuing  
28 court lacked subject matter jurisdiction over the matter).

1 **B. The bankruptcy court erred in determining that Reish did not**  
2 **have a special property interest in the 0041FF.**

3 The bankruptcy court found that at no time pertinent to the  
4 transaction for the 0041FF was it both an identified and an  
5 existing good. Consequently, the aircraft did not constitute a  
6 good for purposes of A.R.S. § 47-2105(B); rather, it was a future  
7 good. As a result, the court found that Reish never obtained a  
8 special property interest in the 0041FF. The Reishes argue that  
9 the bankruptcy court erred in finding that the aircraft was not  
10 both identified and existing. We agree.

11 To determine the issue before us, a discussion of the  
12 pertinent provisions of the Arizona Commercial Code is in order.  
13 A.R.S. § 47-2105, in relevant part, defines goods as:

14 A. "Goods" means all things (including specially  
15 manufactured goods) which are movable at the time of  
identification to the contract for sale . . . .

16 **B. Goods must be both existing and identified before any**  
17 **interest in them can pass. Goods which are not both**  
18 **existing and identified are "future" goods.** A purported  
present sale of future goods or of any interest therein  
operates as a contract to sell.

19 A.R.S. § 47-2105(A), (B) (emphasis added).

20 The identification of a good in a contract creates a special  
21 property interest. A.R.S. § 47-2501. In addition, "[t]itle to  
22 goods cannot pass under a contract for sale prior to their  
23 identification to the contract[.]" A.R.S. § 47-2401(1). Hence,  
24 the precondition for obtaining a special property interest in  
25 goods and for title to pass is that the goods must be "identified  
26 to the contract."

27 Identification of goods occurs in one of three ways: (1) at  
28 the time and manner expressly agreed to by the parties; (2) when

1 the sale contract is made, if the sale is for goods already  
2 existing and identified; or (3) if the contract involves the sale  
3 of future goods - i.e., those goods which are not both existing  
4 and identified - when the goods are shipped, marked or otherwise  
5 designated by the seller as the goods referenced in the contract.<sup>7</sup>  
6 "[T]he general policy is to resolve all doubts in favor of  
7 identification." A.R.S. § 47-2501, cmt. 2.

8 The bankruptcy court found that, while the 0041FF might have  
9 been identified, it was not existing at any point because the  
10 repairs required to make it airworthy were never completed; it was  
11 merely a shell, and the necessary components which needed to be  
12 installed were not. In essence, the court determined that,  
13 because the aircraft was not far enough along in the repair  
14 process, it was not an existing good. To reach this  
15 determination, the court relied on In re Carman, 399 B.R. 599  
16 (Bankr. D. Md. 2009).

17 In Carman, the buyer contracted with the seller to build a

18  
19 <sup>7</sup> A.R.S. § 47-2501 provides, in pertinent part:

20 A. The buyer obtains a special property and an insurable  
21 interest in goods by identification of existing goods as  
22 goods to which the contract refers even though the goods  
23 so identified are non-conforming and he has an option to  
return or reject them. Such identification can be made at  
any time and in any manner explicitly agreed to by the  
parties. In the absence of explicit agreement  
identification occurs:

24 1. When the contract is made if it is for the sale of  
25 goods already existing and identified;

26 2. If the contract is for the sale of future goods  
27 . . . when goods are shipped, marked or otherwise  
designated by the seller as goods to which the contract  
refers.

28 A.R.S. § 47-2501(A)(1)-(2).

1 32-foot motorboat for \$140,000. The buyer paid \$107,000 of the  
2 purchase price, but the boat was never completed or delivered to  
3 him. The seller ultimately filed a chapter 7 bankruptcy case.  
4 The chapter 7 trustee wanted to sell the unfinished boat to a  
5 third party. The buyer objected, claiming a special property  
6 interest in the boat which gave him a vested right to recover the  
7 boat from the seller upon making a tender of the unpaid purchase  
8 price. Id. at 601-02. In rejecting the buyer's argument, the  
9 bankruptcy court held that the unfinished boat was not an existing  
10 good, but rather was a future good in which the buyer did not  
11 obtain a special interest:

12 Under the liberal standard for identification in Section  
13 2-501, when the 32' hull came out of the mold in late  
14 2006, it was identified by Mr. Carman, as the seller, as  
15 for the contract of the buyer, Mr. DeChello. Pursuant to  
16 the limited legal precedent and authority cited to the  
17 court by the parties, however, the hull was at best a  
18 "future good"; it was not an existing "good" in which Mr.  
19 DeChello, as buyer, was vested with a special interest.  
20 [citation omitted]. It was a hull; it was a shell; it was  
21 not a boat. It was a part, not a whole. It lacked  
22 propulsion.

18 . . . .

19 The good contracted for by Mr. DeChello was a motorboat.  
20 The bare 32' hull was not an existing boat. Therefore, it  
21 was not a "good." It was not even a non-conforming good;  
22 rather, it was a "future good." Mr. DeChello thus did not  
23 obtain a special interest in the hull under Section 2-501  
24 of Maryland's Commercial Law Code.

23 Id. at 602-03.

24 In basing its decision on the Carman case, the bankruptcy  
25 court apparently chose to reject the weight of authority which  
26 supports a finding that the 0041FF was an existing good despite  
27 its unfinished state. This was error. See Jones v. One Fifty  
28 Foot Gulfstar Motor Sailing Yacht, 625 F.2d. 44, 47 n.2 & 3 (5th

1 Cir. 1980) (holding that a yacht-construction of which "was not  
2 totally complete" was a "good" within the meaning of the UCC and  
3 that interest could pass); Arthur Glick Truck Sales, Inc. v.  
4 Stuphen East Corp., 914 F. Supp. 2d 529, 542 n.17 (S.D.N.Y. 2012)  
5 (holding that goods can qualify as "existing" despite that seller  
6 has not yet completed installation and manufacturing and citing  
7 authority from jurisdictions with statutes similar to A.R.S. § 47-  
8 2501); Gonsalves v. Montgomery, 2006 WL 2711540, at \*6-8 (N.D.  
9 Cal. Sept. 20, 2006) (collecting authority for the proposition  
10 that partially manufactured goods can qualify as existing and  
11 holding that under California Commercial Code § 2105(2), which is  
12 identical to A.R.S. § 47-2105(B), that a boat "consisting of a  
13 shell and a number of parts" was an "existing" good and one in  
14 which interest may be passed); Carey Aviation, Inc. v. Giles World  
15 Mktg., Inc., 46 B.R. 458, 462 (Bankr. D. Mass. 1985) (applying  
16 Arizona law; although not addressing the issue of existing  
17 explicitly, the bankruptcy court held that the buyer obtained a  
18 "special property interest" in a seized aircraft that was only  
19 two-thirds complete at the time and identified by the seller after  
20 contract formation in the seller's letter requesting funds from  
21 the buyer to complete the project); Holstein v. Greenwich Yacht  
22 Sales, Inc., 122 R.I. 211, 215-16 (R.I. 1979) (applying Rhode  
23 Island's version of UCC § 2-501, which is identical to A.R.S.  
24 § 47-2501(B), and holding that the boat identified in the sales  
25 contract as "Newport 27 #551" was an existing good even though the  
26 boat was not outfitted with all the extras agreed to under the  
27 contract at the time the secured creditor seized it from the  
28 builder's shipyard; accordingly, the buyer obtained a special

1 property interest in the boat superior to the security interest  
2 held by the floor-plan financier).

3 All of the above authorities relied, to some extent, on  
4 comment 4 to § 2-501 of the UCC, which is found in A.R.S. § 47-  
5 2501 and states: "In view of the limited function of  
6 identification there is no requirement in this section that the  
7 goods be in deliverable state or that all of the seller's duties  
8 with respect to the processing of the goods be completed in order  
9 that identification occur." Id. at cmt. 4. See also 3A Anderson,  
10 Uniform Commercial Code, § 2-501:18 (3d. ed. 2017) ("Anderson  
11 UCC") ("Whether the goods are in such a condition that they  
12 conform to the contract and may be delivered in performance of the  
13 contract is distinct from the question of whether the goods have  
14 been identified to the contract").

15 We are persuaded by the reasoning of these courts and  
16 conclude that a good does not need to be complete in order to be  
17 an existing good. Therefore, the bankruptcy court erred in  
18 determining that the 0041FF was not an existing good. Further,  
19 while Carman supports the bankruptcy court's finding that the  
20 0041FF was not an existing good prior to PHP's bankruptcy filing,  
21 we find it distinguishable from this case. Here, the 0041FF was  
22 not being manufactured from scratch, as was the boat in Carman; it  
23 was once an airworthy aircraft, with an assigned serial number,  
24 that was damaged and in need of repair to make it airworthy again.

25 As for identification, Reish and PHP made no explicit  
26 agreement as to the time when identification of the 0041FF would  
27 occur. Therefore, identification occurred either: (1) at the  
28 time of contract if the aircraft was already existing and

1 identified; or (2) if the aircraft was future goods, then at the  
2 time it was "shipped, marked, or otherwise designated" by the  
3 seller. A.R.S. § 47-2501(A)(1)-(2). The sales contract for the  
4 0041FF referenced the make, model, serial number and airframe  
5 hours. Thus, we conclude that it was identified when the contract  
6 was made: February 13, 2014. See Mitchell v. Transamerica  
7 Commercial Fin. Corp. (In re Doughty's Appliance, Inc.), 236 B.R.  
8 407, 416 (Bankr. D. Or. 1999) (goods held by debtor as inventory  
9 were identified to specific contracts if the goods either had been  
10 tagged for specific buyers or corresponded to sales orders  
11 specifying "manufacturer, model number, SKU number, description  
12 and color"); Holstein, 122 R.I. at 215 (finding that the boat was  
13 identified when the contract was made because the parties  
14 specifically referred to it as "hull #151").

15 Accordingly, the 0041FF was an existing and identified good  
16 in which Reish obtained a special property interest at the time of  
17 contract, which was prior to PHP's bankruptcy filing. However,  
18 our inquiry does not end there.

19 Identification serves only a "limited purpose." Anderson UCC  
20 at § 2-501:17. While it gives a buyer a special property and  
21 insurable interest in the goods, it does not shift title to the  
22 buyer; it only allows title to pass. A.R.S. § 47-2501(A);  
23 Anderson UCC at § 2-501:24.

24 A.R.S. § 47-2401 provides that "title passes to the buyer at  
25 the time and place at which the seller completes his performance  
26 with reference to the physical delivery of the goods," unless the  
27 parties have explicitly agreed otherwise. A.R.S. § 47-2401(2).  
28 The sales contract for the 0041FF is a "non-delivery" contract, in

1 that Reish was to pick it up at PHP's facility in Mesa, Arizona.  
2 Where delivery is to be made without shipping the goods, title  
3 passes to the buyer at the time and place the contract is made,  
4 unless the seller is required to deliver a "document of title."  
5 A.R.S. § 47-2401(3). In that case, "title passes at the time when  
6 and the place where [the seller] delivers such documents." A.R.S.  
7 § 47-2401(3)(a).

8 The sales contract for the 0041FF states:

9 The SELLER warrants that the title of the Helicopter will  
10 be free and clear of all encumbrances at the time of said  
11 delivery of the helicopter to the PURCHASER and that the  
12 FAA Bill of Sale conveying title is executed by a fully  
13 authorized person and or persons.

14 Thus, PHP was to deliver a document of title – the "FAA Bill of  
15 Sale conveying title" – at some future date to convey title. That  
16 did not occur until the Reish sale to AMOD in November 2015, after  
17 the petition date.<sup>8</sup>

18 We disagree with the Reishes' argument that the 0041FF could  
19 never have been property of the estate. Based on the parties'  
20 agreement about when title would pass, title to the 0041FF did not  
21 pass to Reish until after the petition date, even if he did pay  
22 full price for it prepetition. Accordingly, title to the 0041FF  
23 was in PHP at the time of the petition, thereby giving the estate  
24 at least some interest in it. See § 541(a)(1) (property of the  
25 estate includes all legal or equitable interests of the debtor in  
26 property as of the commencement of the case).

27 Even though title had not passed to Reish for the 0041FF

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28 <sup>8</sup> Even if one considers the sales contract a "destination"  
contract, in that case title passes to the buyer at the time when  
the goods are tendered. A.R.S. § 47-2401(2)(b). The 0041FF was  
never tendered to Reish.

1 until after the petition date, by virtue of his special property  
2 interest he had rights with respect to the aircraft. See A.R.S.  
3 §§ 47-2502 and 47-2716. First, if certain conditions are met, a  
4 buyer has the right to recover the goods under A.R.S. § 47-2502.  
5 Even if the goods have not been shipped, a buyer who has paid a  
6 part or all of the price of goods in which he or she has a special  
7 property interest may, on making and keeping good a tender of any  
8 unpaid portion of their price, recover the goods from the seller  
9 if: (1) in the case of goods bought for personal, family or  
10 household purposes, the seller repudiates or fails to deliver as  
11 required by the contract; or (2) in all cases, the seller becomes  
12 insolvent<sup>9</sup> within ten days after receipt of the first installment  
13 on their price. A.R.S. § 47-2502(A)(1)-(2). In the case of  
14 consumer goods, the buyer takes the goods free of any security  
15 interest created by the seller if that security interest attached  
16 to the goods after the goods had been identified to the contract.  
17 A.R.S. § 47-2502, cmt. 3.

18 Second, a buyer with a special property interest has the  
19 right of replevin. A.R.S. § 47-2716 provides that, in the case  
20 where the goods have not shipped, the buyer "has a right of  
21 replevin for goods identified to the contract if after reasonable  
22 effort he is unable to effect cover for such goods or the  
23 circumstances reasonably indicate that such effort will be  
24 unavailing . . . ." A.R.S. § 47-2716(C). As with A.R.S. § 47-

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26 <sup>9</sup> An insolvency date for PHP was never established.  
27 Evidence suggested that perhaps PHP was insolvent by April 17,  
28 2015, the day PHP executed the Ryuko Note, or by January 30, 2015,  
the date the state court judgment was entered against PHP. This  
appears to be a disputed material fact.

1 2502, a consumer buyer who acquires a right of replevin takes free  
2 of a security interest created by the seller if that security  
3 interest attached to the goods after the goods had been identified  
4 to the contract. See A.R.S. § 47-2716, cmt. 3.

5       Whether Trustee's hypothetical lien interest under § 544 is  
6 superior to that of Reish's special interest will have to be  
7 determined on remand. That answer will largely turn on whether  
8 the 0041FF is a consumer or commercial good. The Reishes  
9 presented evidence that the 0041FF was purchased for personal use.  
10 On the other hand, a proof of claim filed for that aircraft and  
11 various emails between Reish and PHP indicated that it may have  
12 been purchased for commercial use. Trustee took the position that  
13 the 0041FF was a commercial transaction based on the proof of  
14 claim. Because the court found that the 0041FF was not an  
15 existing and identified good in which Reish obtained a special  
16 property interest, it did not decide the disputed issue of whether  
17 the 0041FF was a consumer or commercial good.

18       The factual determination of whether the 0041FF is a consumer  
19 or commercial good is important here, as it affects what remedies  
20 Reish may have against the Liquidation Trust and whether his  
21 interest in that aircraft trumps that of the Liquidation Trust.  
22 On remand, the bankruptcy court will have to make that factual  
23 determination.

24       The Reishes also contend that the bankruptcy court erred in  
25 conclusively determining that no credits were or could be issued  
26 for the 0041FF when that issue was in dispute. The court  
27 determined that no valid setoff of \$175,000 occurred to finish  
28 satisfying Reish's purchase price for the 0041FF because mutuality

1 of the parties was lacking. In other words, Reish could not apply  
2 a credit of \$175,000 owed to Ryuko for a Reish project such as the  
3 0041FF. The court apparently made its determination based on a  
4 term in the Ryuko Note, which said: "Principle's [sic] funds to  
5 be credited to Phoenix Heliparts, Inc. to cover the expenses of  
6 ongoing and future Ryuko, Inc. projects including, but not limited  
7 to, Aircraft S/N 0175FF; S/N 0041FF; and S/N 270082D."

8 The court viewed the Ryuko Note as unambiguous, in that  
9 credits could be applied only to Ryuko projects to satisfy the  
10 Ryuko debt. However, the Ryuko Note was not so clear. Although  
11 it stated that credits could be applied to "ongoing and future  
12 Ryuko projects," the Ryuko Note specially included "S/N 0041FF" -  
13 a Reish project. Accordingly, it appears that credits for some or  
14 all of the debt could or would be applied to at least one Reish  
15 project. Given the lack of clarity here, it was not proper for  
16 the court to resolve this disputed issue on summary judgment.

17 **C. The bankruptcy court erred in granting the MSJ.**

18 Summary judgment is properly granted when no genuine issues  
19 of disputed material fact remain, and, when viewing the evidence  
20 most favorably to the non-moving party, the movant is entitled to  
21 prevail as a matter of law. Fed. R. Civ. P. 56 (applicable in  
22 adversary proceedings by Rule 7056); Celotex Corp. v. Catrett, 477  
23 U.S. 317, 322-23 (1986). Material facts are those that may affect  
24 the outcome of the case under applicable substantive law.  
25 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And  
26 issues are genuine only if the trier of fact reasonably could find  
27 in favor of the nonmoving party on the evidence presented. Far  
28 Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001)

1 (citing Anderson, 477 U.S. at 248-49).

2 The bankruptcy court made an error of law because it applied  
3 an incorrect standard for determining whether the 0041FF was an  
4 existing and identified good. Because of this, the court never  
5 made a determination on the disputed factual issue of whether the  
6 0041FF was a consumer good. Further, the terms of the Ryuko Note  
7 and whether credits for Reish projects could be applied toward the  
8 debt was not clear. Accordingly, because material factual issues  
9 remain in dispute regarding the 0041FF, Trustee was not entitled  
10 to judgment as a matter of law, and the court erred in granting  
11 him partial summary judgment.

12 **VI. CONCLUSION**

13 We VACATE the MSJ Order and REMAND the issues regarding the  
14 0041FF to the bankruptcy court for further determination  
15 consistent with this decision.

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