

ENTERED JAN 22 2009

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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
CONSTANTINE GEORGE DOUGENIS,
Debtor.

Bankruptcy No. 05-02959-JM7

Adversary No. 06-90003-JM7

GREGORY A. AKERS, Chapter 7
Trustee,
Plaintiff,
v.
MARIAN KHOURY aka MARIAN
DOUGENIS,
Defendant.

MEMORANDUM DECISION

I

Gregory Akers, Chapter 7 Trustee ("Plaintiff" or "Trustee") filed this complaint to avoid and recover \$120,000 from Marian Khoury ("Defendant"). The Trustee contends that the transfer of the \$120,000 was fraudulent as to the creditors of the Debtor, and therefore avoidable under 11 U.S.C. §§ 548 or 544. Alternatively, the Trustee claims the Defendant holds the funds or their proceeds in trust for

1 the Debtor and is subject to a turnover order under § 542. The
2 Trustee asks for turnover of the house in which the couple lives, and
3 a vehicle, as proceeds of the \$120,000. In addition, the Trustee
4 requests punitive damages against Defendant on the grounds that her
5 conduct was despicable and done with a conscious disregard of creditor
6 rights so as to constitute oppression, fraud or malice. The matter
7 was tried on August 28, 2008, with the trial continuing on August 29,
8 2008, September 10, 2008, and September 16, 2008, at which time the
9 matter was taken under submission. For the following reasons, the
10 Court will enter judgment in favor of the Trustee in the amount of
11 \$4,040.16, and deny all further relief requested.

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13 II

14 FACTS

15 The Defendant is the Debtor's wife. She and the Debtor were
16 married on August 31, 2002. About a year later, the Debtor sold a
17 house he owned before the marriage on La Callecita, and the couple
18 moved in with the Debtor's parents. They lived with his parents until
19 November or December 2004. During that time, they put most of their
20 personal possessions in storage. On May 26, 2004, their storage unit
21 was burglarized.

22 The property was insured by a policy through Farmer's Insurance,
23 which was held by the Debtor's parents. Based on an itemized list of
24 the property that was stolen, the adjuster for Farmer's Insurance set
25 the fair market value of the property at \$135,431.15 and issued a
26 check for \$129,750.00, the limit of the policy. The check was issued
27 to the Debtor, the Defendant, and the Debtor's parents. On August 17,
28 2004, the check was deposited into the joint account of the Debtor and

1 the Defendant. On August 18, 2004, the very next day, \$120,000 of the
2 proceeds were withdrawn from the joint account and placed into the
3 Defendant's separate account. The remaining \$9,750 was used to pay
4 creditors for debts incurred by the Debtor.¹ The Debtor filed a
5 Chapter 7 petition on April 8, 2005. The Defendant did not file a
6 bankruptcy petition.

7 The Defendant provided bank records, which include details on how
8 the \$120,000 was spent from the time of the deposit until the account
9 was depleted in early November 2004. The bank records show that the
10 money was used to pay two other debts incurred by the Debtor: \$11,000
11 to Ricardo Cruz, and \$2,500 to G.U. Associates, for a family vacation
12 to Hawaii, for general family expenses such as groceries, clothes,
13 gas, payments to a hospital, and other household purchases. The
14 entire \$120,000 was disbursed in early November 2004, when the
15 Defendant used \$85,000 of the funds as the down payment on a house at
16 3323 Nutmeg Street, ("Nutmeg Property"), which she purchased in her
17 name alone as her separate property. As part of the Nutmeg Property
18 purchase, the Debtor executed a quit claim deed to acknowledge that
19 the couple agreed that the house was the separate property of the
20 Defendant. The Debtor, the Defendant and their children live at the
21 house, and community funds have been used to make the payments on the
22 debts secured by the Nutmeg Property. In July 2005, after the Debtor
23 had filed his Chapter 7 petition, the Defendant refinanced the Nutmeg
24 Property and used a portion of those proceeds as a down payment on a

25
26 ¹ The Debtor and Defendant took the position that the debts incurred by the Debtor were his
27 separate debts for which the Defendant was not liable. It is not necessary for the Court to decide whether
28 any particular obligation was a separate debt or a community debt as part of this adversary proceeding.
The parties did not present sufficient evidence concerning the nature of the obligations for the Court to
rule on the issue either way. The Court was not provided with enough facts to determine whether the
debts were incurred before or after marriage, or whether the purpose was to benefit the community.

1 Land Rover. Community funds have been used to make payments on the
2 Land Rover.

3 The Defendant and the Debtor filed separate tax returns in 2004
4 and 2005, and the Defendant's driver's license remains in her maiden
5 name. She sometimes uses the Debtor's last name for church functions.
6 The Defendant depleted her separate property stock assets to support
7 the family during the years 2004 and 2005, but the precise timing and
8 use of these funds was not clear from the evidence. The Debtor and the
9 Defendant each contribute their earnings to pay the ongoing family
10 expenses. The Debtor either pays bills in cash, or puts money in the
11 Defendant's account and she writes checks to pay bills.

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III

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DISCUSSION

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A. The Claims for Relief

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The Trustee included two claims in the complaint against the Defendant. The first seeks to avoid the deposit of \$120,000 to Defendant's account as either an actual or constructive fraudulent transfer under § 548 or § 544 and Cal.Civ.Code §§ 3439.04 or 3439.05. The Trustee requests punitive damages as part of the first claim for what he contends is despicable conduct of the Defendant. In both the claims, the Trustee alleges that any funds received by the Defendant in which the Debtor had an interest, were held by the Defendant in trust. In the second claim, the Trustee asks the funds be turned over to the Trustee pursuant to § 542, or that the proceeds of the money, including the Nutmeg Property and the Land Rover, be declared property of the estate. The Trustee also requests a declaration that the Defendant is not entitled to claim a homestead exemption in the Nutmeg

1 Property.

2 To avoid a transfer under the first claim, the Trustee has the
3 burden to prove that the transfer involved "an interest of the debtor
4 in property," referring to property that would have been part of the
5 estate had it not been transferred before bankruptcy. In re Beverly,
6 374 B.R. 221, 233 (9th Cir. BAP 2007); In re Heddings Lumber &
7 Building Supply Inc., 228 B.R. 727, 729-730 (9th Cir. BAP 1998). In
8 addition, the Trustee must prove either that the Debtor had the actual
9 intent to hinder, delay or defraud a creditor; or that the Debtor did
10 not receive reasonably equivalent value for the property transferred
11 and the Debtor was insolvent or made insolvent by the transfer.

12 There is no dispute on the final issue. Throughout the year
13 2004, the Debtor owed creditors an amount that was substantially more
14 than the value of his assets at the time. The Trustee filed a motion
15 for partial summary judgment, which was heard on May 29, 2008. The
16 main issues left for trial after summary judgment were the extent of
17 the Debtor's interest in assets that were transferred to the
18 Defendant, whether any such transfer was made with intent to hinder,
19 delay or defraud a creditor, and what the appropriate remedy would be
20 for any avoided transfer.

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22 B. Character of the property as Separate or Community

23 Separate property of a married person in California is defined
24 by Cal. Family Code § 770 to include: (1) All property owned by the
25 person before marriage; (2) all property acquired by the person after
26 marriage by gift, bequest, devise, or descent; and (3) the rents,
27 issues, and profits of the foregoing. Each spouse's interest in
28 jointly held property is his or her own separate property. In re

1 Estate of Mitchell, 76 Cal.App. 4th 1378, 1385 (1999). Before either
2 spouse files a bankruptcy petition, each spouse may take his or her
3 one-half interest in community property without incurring fraudulent
4 transfer liability. See, Britt v. Damson, 334 F.2d 896, 902 (9th Cir.
5 1964). As a general rule, each spouse has an equal right to manage
6 community property. In re Maynard, 264, B.R. 209, 214 (9th Cir. BAP
7 2001).

8 The Trustee contends that once he established that the \$129,750
9 insurance check was deposited in the joint account, the burden shifted
10 to the Defendant to trace the character and disposition of the funds.
11 The itemization used by the insurance company to determine the amount
12 of the check is an extremely helpful tool available because of the
13 circumstances of this case. The seventeen page list has details such
14 as the brand name, color, cost and vendor of each item, and includes
15 the property accumulated by the Debtor and the Defendant such as
16 articles of clothing, handbags, shoes, dishes, art, small appliances,
17 an inventory of their wine collection, household decorations and golf
18 clubs. The Court finds the Defendant's testimony as supplemented by
19 the detailed description of property in Exhibit A to be credible to
20 establish the character of the property that was stolen. The meaning
21 of the term "age" as used on Exhibit A is ambiguous, and most likely
22 refers to the time in use of a particular item.

23 The Defendant reviewed the list of the couple's belongings and
24 assigned to each the designation of separate, joint or community
25 property based on the time frame each item was acquired. She gave
26 examples of events to which she wore certain outfits, to bolster her
27 categorization of many of the items as her separate property which she
28 acquired before marriage. The Court also agrees with Defendant's

1 conclusion that the donors of the bridal shower gifts intended those
2 presents to be for the Defendant as her separate property. These pre-
3 wedding showers were "women only" celebrations, the Debtor did not
4 attend the parties, and the gifts were labeled with the Defendant's
5 name alone.

6 Based on the evidence provided at trial, the Court finds that
7 after proration, the check from Farmer's Insurance represented
8 proceeds of property in the following amounts and character:
9 \$65,126.97 was for Defendant's separate property which she acquired
10 before the marriage, \$32,957.28 was for the Debtor's separate property
11 which he acquired before the marriage, \$29,776.20 was property they
12 owned jointly which they acquired before the marriage, and \$1,889.55
13 represented community property acquired after they were married.

14 The Trustee argued that by depositing the joint insurance check
15 into a joint account that the Debtor and the Defendant intended to
16 transmute the character of the insurance proceeds into community
17 property. However, the withdrawal of \$120,000 from the joint account
18 on the very next day indicates the intent of the Debtor and Defendant
19 to acknowledge and protect Defendant's separate property rights as
20 well as provide her with some control over the couple's joint assets.
21 In addition, the form of record title is usually determinative of the
22 character of real property, and can rebut a presumption of community
23 property. In re Summers, 332 F.3d 1240, 1243 (9th Cir. 2003).

24 Whether the burden of proof remained with the Trustee or shifted
25 to the Defendant, the Court concludes that the Defendant provided
26 ample evidence to rebut any presumption created by the brief deposit
27 of the joint check into the joint account. The Defendant also
28 provided sufficient evidence to trace the character and use of the

1 funds. The amount the Defendant was entitled to use as her separate
2 property was \$80,959.84.² She used \$85,000 to purchase the Nutmeg
3 Property, thereby exceeding the amount of her separate property by
4 \$4,040.16. After deducting the \$9,750 used to pay bills of the Debtor
5 from his separate property, the amount transferred to Defendant's
6 account in which the Debtor had any interest was \$39,040.16. The
7 Court is puzzled by the Trustee's relentless attempt to pursue the
8 Defendant for more than this sum.

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10 C. Trust or Transfer?

11 The Trustee alleged in the complaint that any "funds transferred
12 to Defendant in which the Debtor had an ownership interest and that
13 were utilized to purchase the [Nutmeg] Property or, alternatively, the
14 amount of such funds or property that this Court shall find
15 constitutes property of this estate, have at all relevant time been
16 held by defendant for the benefit of Debtor in trust." The Court
17 agrees with this characterization of the deposit of \$39,040.16 into
18 the Defendant's account. Despite the broad definition of the term
19 transfer in § 548, the transaction was more of a method to create a
20 trust without opening a new account. Rather than a transfer by the
21 Debtor to the Defendant of the proceeds of his separate and community
22 property, the \$39,040.16 retained the same status it had before the
23 deposit, but was held by the Defendant in trust for the Debtor. After
24 considering how the funds were used and how the couple handle their
25 finances and regular monthly bills, the Court finds that the deposit
26 was not a transfer from the Debtor to the Defendant. The Debtor

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28 ² This amount is the sum of the Defendant's separate property, one-half of the joint property,
and one-half of the community property.

1 still maintained input and control of how the money was spent. He
2 directed that \$13,500.00 be used to pay Ricardo Cruz and G.U.
3 Associates for debts he incurred. The bank statements submitted as
4 Exhibits L, M, N and O show that the rest of the money was used for
5 a family vacation, groceries, clothes, gas, and other household
6 purchases.

7 The Debtor admitted that he was very poor at managing money, and
8 he would have frittered it away if he had unfettered access to the
9 funds. By putting the money in the Defendant's account, the Debtor
10 was not giving her complete control of the funds, such that she could
11 "invest in lottery tickets or uranium stocks," the example often used
12 to determine an initial transferee under § 550. See, In re Cohen, 199
13 B.R. 709, 715 (9th Cir. BAP 1996), citing In re Bullion Reserve, 992
14 F.2d 544, 548-49 (9th Cir. 1991). Merely depositing the funds in an
15 account solely in Defendant's name did not necessarily result in a
16 transfer to the Defendant. Had the Debtor filed his Chapter 7
17 petition before the money was spent, the funds attributable to his
18 separate property or the couple's community property would have become
19 property of the estate. Similarly, if creditors of the Debtor, such
20 as the Coffmans, had tried to collect a judgment from his assets, it
21 appears they could have traced the proceeds of his assets and
22 collected from that account. However, the money was spent several
23 months before the Debtor filed his Chapter 7 petition, and the only
24 amount of his interest that remains remotely identifiable is the
25 \$4,040.16 used by the Defendant to purchase the Nutmeg Property which
26 exceeded her separate property interests.

27 The Trustee submitted no evidence of the value of the Nutmeg
28 Property. As a result, the Court has no basis upon which to determine

1 whether there was any appreciation in the house to which the
2 community, and therefore the estate, would be entitled based on the
3 use of community funds to make the house payments. The lack of any
4 evidence of community appreciation also prevents any finding that a
5 prepetition community asset was used to purchase the Land Rover.

6 D. Reasonably Equivalent Value

7 Even if the deposit of the \$39,010.16 was considered a transfer
8 to the Defendant, the Debtor received reasonably equivalent value for
9 all but the \$4,040.16, used to buy the Nutmeg Property. As noted
10 above, the funds attributable to the Debtor's interest was used to pay
11 \$13,500 to Ricardo Cruz and G.U. Associates for debts incurred by the
12 Debtor, and for family expenses.

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14 E. Actual Intent to Hinder, Delay or Defraud a Creditor

15 After considering all the evidence, the Court finds that the
16 transfer of the money to Defendant's separate account was not a
17 transfer done with the actual intent to hinder, delay or defraud
18 creditors of the Debtor. The focus is on the intent of the Debtor,
19 as transferor. Beverly, supra 374 B.R. at 235. "The analysis is
20 directed at what the debtor surrendered and what the debtor received
21 irrespective of what any third party may have gained or lost." In re
22 AFI Holding, Inc., 525 F.3d 700, 703 (9th Cir. 2008). The Court has
23 considered the factors enumerated in Cal.Civ. Code § 3439.04(b), but
24 concludes that the placement of the funds in the Defendant's account
25 was a common sense method for the Defendant to retain the proceeds of
26 her separate property, as well as help direct the family spending of
27 the rest of the insurance check.

28 In addition to the insurance proceeds, the Defendant had other

1 separate property that she liquidated and used on behalf of the
2 community during 2004 and 2005. Although the evidence was not
3 sufficiently precise to trace these funds to the purchase of the
4 Nutmeg Property, the dissipation of her separate property dilutes an
5 inference of an intent to hinder, delay or defraud creditors of the
6 Debtor.

7 The Defendant's explanation concerning the purchase of the Nutmeg
8 Property solely in her name was credible. She had sufficient separate
9 assets for the down payment. She had very good credit scores, and
10 including the Debtor as an owner or borrower on the property would
11 have had a detrimental effect on the terms of the financing she was
12 able to obtain by herself. The amount used from her account as a down
13 payment for the Nutmeg Property was very close to the amount the
14 Defendant was entitled to use as her separate property and her portion
15 of the joint property. Rather than replace her stolen clothes, dishes
16 and decorations, she chose to use the money as a down payment on a
17 house for the family. After creating the extremely detailed list of
18 property in Exhibit A, it is credible that the Defendant would have
19 an estimate of the value of her separate property that had been
20 stolen, and used that approximate amount for a down payment on a
21 house. The Court does not agree with the Trustee's conclusion that
22 the Debtor or the Defendant engaged in any form of fraud when the
23 Defendant bought the house in her name, as her separate property. If
24 the couple had purchased the house jointly, they would have been
25 entitled to claim a homestead exemption of \$75,000 in the property,
26 further undermining the Trustee's attempts to show any fraudulent
27 intent by the Debtor or Defendant in her separate purchase of the
28 Nutmeg Property with a down payment of \$85,000.

1 Counsel for the Trustee spent a good deal of time pointing to
2 various phrases from transcripts and documents in an attempt to prove
3 that the Debtor and Defendant were engaged in a scheme to hinder,
4 delay or defraud the creditors of the Debtor, or that they intended
5 the Nutmeg Property to be community property. The Court concludes
6 after listening to the testimony and reviewing the transcripts
7 submitted as exhibits that any inconsistencies in the use of words
8 such as "we" or "our house" merely stem from the fact that a married
9 couple is involved. They live in the same house. From an overall
10 view of the couple's finances, the Court finds there was no fraud
11 involved in the actions included in the complaint, and there is no
12 basis to award punitive damages against the Defendant.

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14 E. Remedies

15 The bankruptcy court is provided wide latitude in exercising its
16 discretion to allow a trustee to recover either the property
17 transferred or the value of the property to restore the estate to the
18 position it would have been without the transfer. In re Taylor, 390
19 B.R. 654, 663 (9th Cir. BAP 2008). In this case, a judgment against
20 the Defendant in the amount of \$4,040.16 is most appropriate to make
21 the estate whole as a result of the use by Defendant of that same
22 amount of Debtor's property to purchase the Nutmeg Property. The
23 Trustee has not established that there is any equity in the Nutmeg
24 Property or the Land Rover that would be of any benefit to the estate.

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V

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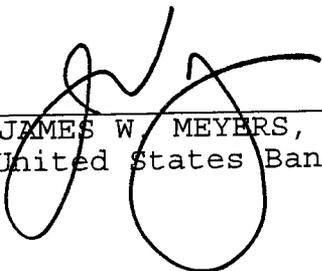
CONCLUSION

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The Trustee is entitled to a judgment in the amount of \$4,040.16

1 against the Defendant, to restore the estate to the position it would
2 have been in had the Defendant not used that sum in excess of her
3 separate property to purchase the Nutmeg Property. The Trustee failed
4 to prove there was any actual intent to delay, hinder or defraud a
5 creditor of the Debtor, or that the Defendant engaged in any
6 despicable conduct that support an award of punitive damages. The
7 Court will enter a separate judgment in favor of the Trustee and
8 against the Defendant in the amount of \$4,040.16.

9 Dated: JAN 21 2009

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11 _____
12 JAMES W. MEYERS, Judge
13 United States Bankruptcy Court
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