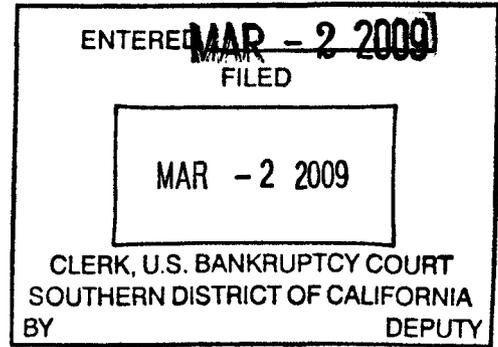


1 WRITTEN ORDER NOT FOR PUBLICATION



8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 In re) Case No. 04-01573-PB11
12 BRIAN J. DOHERTY,) Adv. No. 06-90183-PB
13) ORDER ON MOTIONS FOR
14 Debtor.) SUMMARY JUDGMENT
15)
16 JET SOURCE CHARTER, Inc.,)
17 Plaintiff,)
18 v.)
19 VICTORIA L. DOHERTY; BRIAN J.)
20 DOHERTY; and DOES 1-10,)
Defendants.)

21 Jet Source Charter, Inc., (Plaintiff) has a judgment claim
22 against Brian J. Doherty (Debtor). Plaintiff commenced the
23 above referenced adversary proceeding seeking, among other
24 things, to set aside various transfers from Debtor to his wife
25 Victoria L. Doherty (Defendant). Plaintiff and Defendant have
26 filed motions for summary judgment regarding specific transfers

1 which Plaintiff alleges are avoidable as fraudulent conveyances
2 and/or preferences.

3 This Court has subject matter jurisdiction over the
4 proceeding pursuant to 28 U.S.C. § 1334 and General Order
5 No. 312-D of the United States District Court for the Southern
6 District of California. This is a core proceeding under
7 28 U.S.C. § 157(b)(2)(A) & (H).

8 CASE STATUS

9 On February 20, 2004, Debtor filed a voluntary petition
10 under chapter 11 of the Bankruptcy Code. Plaintiff is a
11 judgment creditor of the Debtor based upon a judgment entered on
12 August 6, 2001 (Judgment). As of the petition date, the Judgment
13 had not been satisfied. The Judgment has been ruled
14 nondischargeable.

15 Plaintiff commenced this adversary proceeding seeking, among
16 other things, to avoid various transfers from Debtor to Defendant
17 as fraudulent transfers under state and federal statutes and/or
18 preferences. Generally, the alleged transfers fall into four
19 categories:

20 1. Money Debtor transferred directly or indirectly into
21 Defendant's bank accounts (Deposits);

22 2. The transfer of the residence at 3192 Caminita Cortina,
23 Fallbrook, California (Residence) from community property to
24 separate property;

25 3. The \$32,200 cashier's check which Defendant withdrew
26 from and later redeposited into her bank account; and

1 4. The alleged concealment of Debtor's interest in the
2 business and commercial property known as Main Street Autobody in
3 Fallbrook, California.

4 Plaintiff and Defendant filed cross-motions for summary
5 judgment. The Court heard argument. At the hearing the Court
6 granted summary judgment in favor of Defendant with respect to
7 the \$32,200 cashier's check and the business and commercial
8 property known as Main Street Autobody. As to the remaining
9 matters, the Deposits and the Residence, the Court gave the
10 parties an opportunity to file supplemental briefs. Plaintiff
11 and Defendant filed supplemental briefs, and the Court thereafter
12 took the matter under submission. In its supplemental brief,
13 Plaintiff argues that there are questions of facts both as to
14 the Residence and the Deposits. For the reasons discussed below
15 the Court agrees and denies both motions on the remaining issues.
16 An evidentiary hearing will be necessary.

17 The Debtor and Defendant were married on December 23, 1981.
18 Prior to the marriage they entered into a prenuptial agreement
19 (Prenuptial Agreement). The Prenuptial Agreement provided that
20 all property owned or acquired by Debtor and Defendant during
21 their marriage would remain the separate property of each.

22 **The Deposits**

23 Throughout the marriage Defendant was employed as a flight
24 attendant with Delta Airlines. She maintained a bank account
25 with Delta Employee's Credit Union. Beginning prior to Debtor's
26 business relationship with Plaintiff, Debtor and Defendant used

1 Defendant's account as a depository for both of their incomes.
2 From this account Defendant paid the joint expenses as well as
3 separate expenses of Debtor. Defendant would then transfer the
4 remainder to Debtor's individual account. According to an
5 accounting provided by Defendant (and not challenged by
6 Plaintiff) from January 2000 to February 2004, \$1,460,044.00 was
7 deposited into the account by or on behalf of the Debtor. During
8 this same period of time Defendant paid Debtor's expenses
9 totaling \$444,788.00. Over the same period \$1,086,000.00 was
10 transferred out of Defendant's account and back into Debtor's
11 personal accounts.

12 Plaintiff seeks to set aside the Deposits as fraudulent
13 conveyances - both actual and constructive.

14 **The Residence**

15 On March 15, 2001, Defendant and Debtor purchased the
16 Residence. The down payment of \$350,000 was paid by Debtor.
17 The Debtor and Defendant initially took title to the Residence
18 as community property as reflected in the Grant Deed. This was
19 done, according to Defendant, at the request of the lender.
20 Concurrent with the purchase they each executed quitclaim deeds
21 transferring their interests to each other as their sole and
22 separate property as to an undivided fifty percent interest.
23 The quitclaim deeds were recorded one day after the Grant Deed
24 was recorded.

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1 DISCUSSION

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3 1. Defendant's Motion

4 Deposits - Actual Fraud

5 Defendant argues that Plaintiff has failed to provide
6 evidence that the Deposits were made with the actual intent to
7 defraud. The Court agrees that Plaintiff has not provided
8 "smoking gun" evidence that Debtor and Defendant intended to
9 defraud creditors. However, direct evidence of fraud is rarely
10 available. Rather, circumstantial evidence of "badges of fraud,"
11 is most often considered by the finder of fact to determine the
12 intent of the transferor. In re Beverly, 374 B.R. 221, 235 (9th
13 Cir.BAP 2007).¹ "Whether there is actual intent to hinder,
14 delay, or defraud under UFTA is a question of fact to be
15 determined by a preponderance of the evidence." Id. "The focus
16 is on the intent of the transferor." Id. In the case at hand,
17 the evidence before the Court is that Debtor and Defendant used a
18 method of bill payment which is at best unconventional, and did
19 in fact result in money being, at least temporarily, out of the
20 hands of the Debtor and beyond the reach of his creditors. While
21 this does not establish intent to defraud as a matter of law, it
22 does give rise to a question of fact with respect to the Debtor's
23 intent - the intent of the debtor being the critical factor.

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¹ A list of the factors to be considered can be found in In re Beverly, 374 B.R. at 235.

1 Defendant relies on In re Montalvo, 333 B.R. 145
2 (Bankr.W.D.Ken. 2005), in which the court found no intent to
3 defraud where the debtor made transfers to the non-debtor wife to
4 pay living expenses. However, that case was decided after trial
5 and based upon a weighing of the evidence. The Court finds that
6 the circumstances surrounding the Deposits gives rise to at least
7 a question of fact regarding Debtor's intent. Defendant's motion
8 for summary judgment on the issue of actual intent with respect
9 to the Deposits is denied.

10 **Deposits - Constructive Fraud**

11 Defendant also seeks summary judgment on the ground that
12 Debtor received reasonably equivalent value in exchange for the
13 Deposits because Defendant used the money to pay Debtor's
14 obligations and returned the remainder to Debtor. Like intent,
15 reasonably equivalent value is a question largely of fact. The
16 fact that Debtor's estate was ultimately not reduced, does not
17 necessarily carry the day as to the value Debtor received when
18 the Deposits were made. None of the cases relied upon by
19 Defendant deal with the situation we have in this case where the
20 Defendant did not immediately use the money to pay Debtor's
21 obligations, the obligations which were ultimately paid did not
22 necessarily exist at the time of the Deposits, and the Defendant
23 was, so far as the Court can tell, under no contractual
24 obligation to use the Deposits to pay Debtor's obligations. The
25 Montalvo case, as noted, was decided after a trial and based upon
26 Kentucky law (which provided that debtor had a legal obligation

1 to support his wife and children). The Court finds that it has
2 insufficient evidence of the actual value that Debtor received at
3 the time the Deposits were made. The ultimate determination may
4 depend upon the agreement, understanding and practice of the
5 Defendant and Debtor. At any rate, this question of fact
6 requires denial of Defendant's motion for summary judgment on
7 this ground. Accordingly, Defendant's motion for summary
8 judgment with respect to the Deposits is denied.

9 **Residence - Actual Fraud**

10 Debtor and Defendant took the Residence as community
11 property, which was contrary to their Prenuptial Agreement. As
12 community property it was available, subject to homestead
13 considerations, to creditors of both. Defendant and Debtor
14 promptly transferred their community property interests in
15 exchange for separate interests in half of the Residence,
16 rendering the other half beyond the reach of creditors of the
17 other. This may have been, as Defendant argues, initially an
18 innocent adherence to the demands of the lender and,
19 subsequently, their longstanding Prenuptial Agreement. On the
20 other hand, it may have been with the intent to hinder or delay
21 creditors. In State Board of Equalization v. Woo, 82 Cal.App.4th
22 481 (2000), the court held that a transmutation of community
23 property to separate property did, in that case, amount to an
24 intentional fraudulent conveyance. The Court has insufficient
25 evidence to make this determination as a matter of law.
26 Specifically, Defendant has failed to provide any testimony of

1 the Debtor of his intent - that, as discussed above, being the
2 focus. Accordingly, Defendant's motion for summary judgment on
3 this ground is denied.

4 **Residence - Constructive Fraud**

5 Debtor and Defendant acquired the Residence as community
6 property, but immediately thereafter Debtor transferred his
7 community interest in the Residence to Defendant in exchange for
8 a separate interest in the half. Plaintiff seeks to set aside
9 the transfer as constructively fraudulent, arguing that Debtor
10 received less than reasonably equivalent value. However, it is
11 unclear from Plaintiff's argument exactly what transfer it seeks
12 to set aside. At first blush, it appears Plaintiff is focusing
13 on the transfer by Debtor of his community property interest in
14 the Residence in exchange for a separate property interest in
15 half of the Residence. If this is the case, Plaintiff, who has
16 the burden to establish less than reasonably equivalent value,
17 has provided neither evidence nor authority establishing that
18 Debtor received less than he gave. Debtor began with a community
19 property interest in the entire property and exchanged that for
20 an undivided 50% interest in the Residence as a tenant in common.

21 That is, of course, different from the creditor's
22 perspective, where a creditor has less to look to. Another facet
23 of Plaintiff's argument appears to be that because Debtor paid
24 the \$350,000 down payment, and then gave Defendant a one-half
25 interest in the Residence for no immediate consideration, that
26 transfer was constructively fraudulent.

1 1. Transfers of Brian Doherty's income directly to the
2 account of Victoria Doherty are intended to delay, hinder and
3 defraud Doherty's creditors.

4 2. The property held as the separate property of Victoria
5 Doherty was transferred to her without an exchange of value and
6 is therefore a fraudulent conveyance.

7 3. The transfers of money and property were improper
8 preferential transfers."

9 **Deposits - Actual Intent**

10 With respect to the assertion of actual intent with respect
11 to the Deposits, Plaintiff admitted at hearing that a ruling
12 would have to be based upon circumstantial evidence presented to
13 the Court at a trial. See Transcript at 26:10-20. Plaintiff
14 suggests the same in its Supplemental Points and Authority. The
15 Court agrees.

16 In the case upon which Plaintiff seems to rely most heavily,
17 Kirkland v. Risso, (1980) 98 Cal.App.3d 971, the court found
18 actual intent only after trial. It may turn out that the
19 evidence in this case supports a finding of actual intent after
20 trial. However, the evidence presented in support and opposition
21 to the motions for summary judgment does not establish the fact
22 as a matter of law - there remain material issues of fact. The
23 Kirkland case does provide that relatives in a "confidential
24 relationship" "are held to a fuller and stricter proof of the
25 consideration and fairness of the transaction." Id. at 978-79.
26 The Court will certainly keep that in mind when this case comes

1 to an evidentiary hearing. However, that slight weighting in the
2 relative burdens will not carry a motion for summary judgment
3 where issues of fact exist.

4 Plaintiff recognizes that it will likely have to rely on one
5 or more of the "badges of fraud," and asserts that no particular
6 number of badges are necessary for finding of fraud citing In re
7 Serrato, 214 B.R. 219 (Bankr.N.D.Cal. 1997). Again, the Court is
8 persuaded that this is an accurate statement of the law.
9 However, whether any badges of fraud exist is a factual issue
10 which will be addressed in an evidentiary proceeding. In
11 Serrato, the court found actual fraud based upon the existence of
12 numerous badges of fraud. Id. at 231. However, this was only
13 after the court conducted a lengthy trial. Id. at 225.

14 In In re Beverly, the trustee provided evidence in the form
15 of correspondence of the debtor that the pre-judgment division of
16 property was specifically designed to keep the property from the
17 reach of the judgment creditor - "the direct evidence in the
18 debtor's own words in letters to his spouse's counsel ... is
19 remarkably candid." Id. at 236. The correspondence, received by
20 the spouse, also served to belie her claim of good faith. Id. at
21 239. In the case at hand, we have no such direct evidence - only
22 Plaintiff's conjecture as to the intent of the Debtor and
23 Defendant.

24 Accordingly, Plaintiff's motion for summary judgment on the
25 issue of actual intent relative to the Deposits is denied.

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1 **Deposits - Constructive Fraud**

2 With respect to the assertion of less than reasonably
3 equivalent value, in its Supplemental Points and Authority
4 Plaintiff admits that a question of fact exists as to these
5 transactions and whether received reasonably equivalent value was
6 provided. The Court agrees. Accordingly, Plaintiff's motion as
7 it relates to the Residence is denied.

8 **Residence**

9 As discussed above, Plaintiff has failed to establish that
10 as a matter of law or uncontroverted fact the transfer of form of
11 ownership - from community property to separate property - was
12 done for less than reasonably equivalent value. Plaintiff has
13 also failed to establish as a matter of law that it was done by
14 Debtor with the actual intent to hinder or delay his creditors.
15 Accordingly, Plaintiff's motion for summary judgment with respect
16 to the Residence is denied.

17 **Preferences**

18 The only other assertion in Plaintiff's motion is that
19 certain unidentified transfers of money and property from Debtor
20 to Defendant were preferences. However, so far as the Court can
21 discover, Plaintiff has provided no evidence that Debtor was
22 indebted to Defendant at the time of any of the transfers.
23 Accordingly, Plaintiff's motion on this ground is denied as well.

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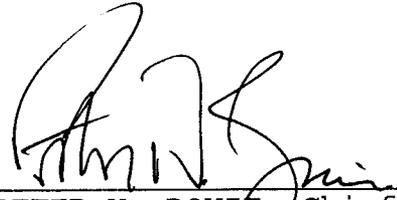
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CONCLUSION

For the reasons discussed above, except as provided by the Court in the hearing, the motions of Plaintiff and Defendant are denied.

IT IS SO ORDERED.

DATED: MAR - 2 2009



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court