

1 WRITTEN DECISION - NOT FOR PUBLICATION

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6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY 128 18 DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 06-00062-B11

12) Adv. No. 08-90587

13 ALPHA MEDICAL CENTER)

14 PARTNERS, LLC,)

15 Debtor.) ORDER ON MOTION FOR

16) SUMMARY JUDGMENT

17)

18 GERALD DAVIS, Chapter 7)

19 Trustee,)

20 Plaintiff,)

21 v.)

22 CALIFORNIA BANK &)

23 TRUST, et al.,)

24 Defendants)

25 Prior to filing this bankruptcy case, debtor and/or debtor's

26 principals borrowed money from the bank. Debtor repaid the

27 borrowed funds. The trustee brought an action to recover the

28 funds against the bank and debtor's principals alleging

29 preference and fraudulent transfer. The trustee proposed a

30 settlement with the bank, acknowledging that debtor received

1 Partnership (the Waltz Defendants), Bosio, Salisbury and CB&T,
2 seeking to recover the transferred funds under four Claims for
3 Relief:

4 First: preference under Bankruptcy Code § 547 against all
5 defendants except CB&T;

6 Second: fraudulent transfer under California Civil Code
7 § 3439.04 against all defendants;

8 Third: fraudulent transfer under California Civil Code
9 § 3439.05 against all defendants; and

10 Fourth: fraudulent transfer under Bankruptcy Code § 548 as
11 against all defendants.

12 On or about April 22, 2009, the Trustee served and filed a
13 Notice of Intended Action, whereby he noticed his intent to enter
14 into a Settlement Agreement with CB&T. In Attachment "A" to the
15 Notice of Intent, the Trustee explained:

16 CB&T has provided evidence that the Debtor received the
17 transferred funds identified in the Complaint and
18 therefore, received reasonably equivalent value from
19 CB&T in exchange for the transfers identified in the
20 Complaint.

21 In support of the Intended Action the Trustee declared:

22 For the reasons indicated in Attachment "A" to the
23 Notice of Intended Action and Opportunity for Hearing
24 ... I believe that the Settlement Agreement is in the
25 best interest of the estate.

26 Based upon the Trustee's representations, on June 3, 2009,
the Court approved the settlement with CB&T and the dismissal of
the Complaint as to CB&T.

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1 In the present motion, the Trustee seeks summary judgment on
2 his Second and Third Claims for Relief as against the Waltz
3 Defendants. As noted above, the Second and Third Claims for
4 Relief are brought under California Civil Code §§ 3439.04 and
5 3439.05. The Trustee has an insurmountable problem.

6 A required element of both § 3439.04 and § 3439.05 is that
7 the debtor made the transfer "without receiving a reasonably
8 equivalent value in exchange for the transfer..." As noted
9 above, the Trustee took the position in his Notice of Intended
10 Action and settlement with CB&T, that the Debtor "received
11 reasonably equivalent value from CB&T in exchange for the
12 transfers identified in the Complaint." Based upon Trustee's
13 assertion, the Court approved the settlement with CB&T. The
14 Trustee is judicially estopped from now taking an inconsistent
15 position. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778,
16 782 (9th Cir. 2001); U.S. v. Lence, 466 F.3d 721, 726 (9th Cir.
17 2006). The doctrine of judicial estoppel is "applied to bar a
18 party from making a factual assertion in a legal proceeding which
19 directly contradicts an earlier assertion made in the same
20 proceeding or a prior one." Russell v. Rolfs, 893 F.2d 1033,
21 1037 (9th Cir. 1990).

22 The Trustee attempts to avoid this conclusion by directing
23 the Court's attention away from the transferor, Debtor, and to
24 the alleged transferees. The Trustee then differentiates CB&T on
25 the one hand as the direct transferee and the Waltz Defendants
26 (and Bosio and Salisbury) on the other as the indirect

1 transferees. The Trustee argues that the settlement with CB&T
2 had nothing to do with the case against the indirect transferees.
3 The Trustee is wrong. In a fraudulent transfer action, the issue
4 is not whether the transferee gave reasonably equivalent value,
5 but whether the transferor received reasonably equivalent value.
6 An express element of both § 3439.04 and § 3439.05 is that the
7 debtor made the transfer "without receiving a reasonably
8 equivalent value in exchange for the transfer" (Emphasis
9 added). The focus of this element is not on what the transferee
10 gave up, but what the transferor debtor received. Thus, the
11 Trustee's admission that Debtor received reasonably equivalent
12 value in exchange for the payment to CB&T applies to the direct
13 transferee, CB&T, as well as the alleged indirect transferees,
14 the Waltz Defendants (and Bosio and Salisbury).

15 Similarly, it does not avail the Trustee to argue that CB&T
16 "got as good as it gave." That fact, if established, may have
17 given rise to a defense in favor of CB&T. However, a possible
18 defense was not the basis of the CB&T Settlement. Rather, the
19 CB&T Settlement was based upon the acknowledgment by the Trustee
20 that Debtor received reasonably equivalent value, and thus there
21 was no fraudulent transfer in the first place.

22 The same is true of the Trustee's suggestion that the
23 settlement was merely an acknowledgment by the Trustee that CB&T
24 had no knowledge of the improper use of Debtor's funds. Again,
25 CB&T's knowledge or lack thereof may have supported a defense,

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1 but it has nothing to do with the Trustee's case in chief -
2 whether Debtor received reasonably equivalent value.

3 Because a lack of receipt by the Debtor of reasonably
4 equivalent value in exchange for the transfer is a required
5 element under Trustee's Second and Third Claims for Relief, the
6 Trustee's motion for summary judgment on those claims is denied.
7 Rather, the Court will grant the Waltz Defendants request for
8 summary judgment on those claims.

9 The Waltz Defendants also sought summary judgment on the
10 Fourth Claim for Relief under Bankruptcy Code § 548. A claim
11 under § 548 can be established either upon a showing of "intent
12 to hinder, delay or defraud..." or a lack of reasonably
13 equivalent value. Accordingly, the Trustee's admission that
14 Debtor received reasonably equivalent value does not preclude his
15 claim under § 548 entirely. Summary judgment will not be granted
16 on the Fourth Claim for Relief.

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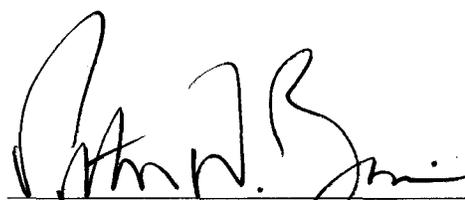
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CONCLUSION

For the foregoing reasons, the Court denies the Trustee's motion for Summary Judgment on the Second and Third Claims for Relief. The Court grants Summary Judgment in favor of the Waltz Defendants on the Second and Third Claims for Relief, but denies their request for Summary Judgment on the Fourth Claim for Relief.

IT IS SO ORDERED.

DATED: NOV -3 2011



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court