

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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ENTERED JAN 18 2013 FILED JAN 17 2013 CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 07-04977-PB7
12 CREATIVE CAPITAL LEASING GROUP,) Adv. No. 09-90456-PB
13 LLC,) ORDER ON DEFENDANT
14 Debtor,) CITIBANK, N.A.'S MOTION
15) FOR PARTIAL SUMMARY
16) JUDGMENT
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LESLIE T. GLADSTONE, CHAPTER 7
TRUSTEE,
Plaintiff,
v.
CITIGROUP, INC.; CITIBANK USA,
NA aka CITIBANK, NA aka CITIBANK
USA; CITIBANK CORPORATION;
CITIBANK CREDIT CARD ISSUANCE
TRUST; CITIBANK (SOUTH DAKOTA),
NA,
Defendants.

24 Trustee sued Defendants to recover as fraudulent conveyances
25 payments which Debtor had made on various credit card accounts.
26 Defendant Citibank, N.A., moved for partial summary judgment

1 that: \$516,079 which was paid on a credit card account opened, at
2 least in part, in Debtor's name, was for reasonably equivalent
3 value, because Debtor was contractually obligated to make the
4 payments; and \$22,740 paid on an individual card was for
5 reasonably equivalent value because it was reimbursement of
6 equipment purchased for the Debtor. As to the \$516,079,
7 Defendant has failed to provide evidence that Debtor was
8 obligated to make the payments. However, as to the \$22,740
9 payment on the individual card, Defendant has demonstrated that
10 under the law of the Ninth Circuit, Debtor received reasonably
11 equivalent value. Accordingly, the motion for partial summary
12 judgment is denied in part and granted in part.

13 **BACKGROUND**

14 Creative Capital Leasing Group, LLC (Debtor or Company) was
15 in the business of managing and leasing real estate and heavy
16 equipment. From 1999 forward, David Winick was the sole named
17 member and principal of Debtor. David's brother Michael Winick
18 also had some involvement in the business.

19 In the complaint, the Trustee alleges that Debtor made
20 payments to Defendant on several credit cards and lines of credit
21 issued to Debtor, David and other family members, though Debtor
22 had no legal obligation to do so. The Trustee seeks to recover
23 those Payments as fraudulent conveyances and/or preferences.

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1 In the Motion, Defendant focuses on two of the credit card
2 accounts:

3 - 5082 2900 5074 3597 (formerly account number 5588 3280
4 0161 3904) (each referred to as the "-3597 Account"); and
5 - 4147 1110 3595 7332 issued to Michael Winick individually
6 (the "-7332 Account").

7 As to the -3597 Account, which Defendant calls the "Company
8 Card," Defendant argues that the card was applied for by, and
9 issued to Debtor and that under the terms of the credit
10 agreement, Debtor was contractually obligated to make the
11 payments (\$516,079).

12 As to the -7332 Account, Defendant contends that the \$22,740
13 payment was a reimbursement to Michael Winick for equipment he
14 had purchased for the Debtor. In both cases, argues Defendant,
15 Debtor had a legal obligation to make the payments, and hence
16 they were made for reasonably equivalent value.

17 **-3597 Account Payments**

18 It is undisputed that Debtor made payments totalling
19 \$516,079 on the -3597 Account. Defendant's legal argument as to
20 this account is sound - if Debtor was contractually obligated to
21 make the payments, then the payments satisfied that obligation
22 and were thus made for reasonably equivalent value. The problem
23 is that Defendant has provided no competent evidence that Debtor
24 was actually contractually obligated to make the payments.

25 In support of its motion Defendant filed the declaration of
26 Christy G. Bennett, "an authorized representative and employee of

1 Citibank, N.A...." With respect to the -3597 Account Ms. Bennett
2 declared:

3 Citibank's records reflect that on or about March
4 13, 2001, a Citi Platinum Select Aadvantage Business
5 Card credit card account ending in 3597 (the "Company
6 Account") was opened in the names of applicants
7 Creative Capital (the "Company") and David W. Winick
8 ("Dwinick").

9 Citibank has not been able to locate the
10 application for the Company Account because it was
11 opened more than seven years ago.... Attached as
12 Exhibit A is a true and correct exemplar of the terms
13 and conditions governing the Company Account (the "Card
14 Agreement") at or about the time it was opened. The
15 Card Agreement required, among other things, that the
16 Company pay all amounts charged on the Company Account.

17 . . .

18 From the opening of the Company Account in March
19 2001 until the Company Account was closed, various
20 authorized sub-accounts beginning with the account
21 number "5588" were issued at the Company's request and,
22 as a result, transactions on the 5588 sub-accounts are
23 included with and reflected on the Company Account,
24 which the Company was legally obligated to pay.

25 Credit card charges, payments, and other debts on
26 the Company Account (including all sub-accounts) are
reflected in monthly statements for the Company Account
(the "Company Account Statements"). From September 15,
2003 to August 22, 2007, Citibank received a total of
48 payments on the Company Account in the amount of
\$516,079. Citibank has produced the Company Account
Statements from 2003 to 2007.

In a supplemental affidavit she clarified:

Citibank does not retain card agreements governing
its credit card accounts at an account level. Card
Agreements are instead retained by portfolio and the
governing card is (sic) agreement is determined by the
date the account was opened and by portfolio.

The Company Account was in the Citi Platinum
Select AAdvantage Business Card portfolio, as is
reflected on the Company Account statements.

1 The card agreement that was in effect in March
2 2001 for the Company Account and for the Citi Platinum
3 Select AAdvantage Business Card portfolio was attached
4 to my original affidavit as Exhibit A and is once again
5 attached hereto as Exhibit A (the "Card Agreement").

6 Other than the Card Agreement attached hereto as
7 Exhibit A, there was no other card agreement in effect
8 for the Company Account or the Citi Platinum Select
9 AAdvantage Business Card portfolio at the time the
10 Company Account was opened.

11 Based upon the Card Agreement and Ms. Bennett's affidavits,
12 Defendant contends that it has established Debtor's contractual
13 liability to make the payments. The Court is not persuaded.

14 Federal Rule of Evidence 803(6) governs the admissibility of
15 business records. That Rule provides that such a record is
16 admissible if:

- 17 (A) the record was made at or near the time by—or from
18 information transmitted by—someone with knowledge;
- 19 (B) the record was kept in the course of a regularly
20 conducted activity of a business, organization,
21 occupation, or calling, whether or not for profit;
- 22 (C) making the record was a regular practice of that activity;
- 23 (D) all these conditions are shown by the testimony of
24 the custodian or another qualified witness, or by a
25 certification that complies with Rule 902(11) or (12)
26 or with a statute permitting certification; and
- (E) neither the source of information nor the method or
 circumstances of preparation indicate a lack of
 trustworthiness.

 Federal Rule of Evidence 902 sets forth certain documents
which are self-authenticating, and lists certain records of
regularly conducted activity as such items, stating that the
following is required:

- (11) Certified Domestic Records of a Regularly
Conducted Activity. The original or a copy of a
domestic record that meets the requirements of Rule
803(6)(A)-(C), as shown by a certification of the
custodian or another qualified person that complies

1 with a federal statute or a rule prescribed by the
2 Supreme Court. Before the trial or hearing, the
3 proponent must give an adverse party reasonable written
4 notice of the intent to offer the record—and must make
5 the record and certification available for
6 inspection—so that the party has a fair opportunity to
7 challenge them.

8 Prior to the hearing, the Trustee challenged Ms. Bennett's
9 qualification as custodian on the ground that she was not with
10 Citibank at the time the Company Card was applied for and issued.
11 The Court is satisfied that a custodian need not have been with
12 the company at the time the record was created. Were that the
13 case, custodians would have to be at least as long-lived as
14 corporations and willing to work at least as long as the employer
15 retains and relies upon its records.

16 The problem here is not Ms. Bennett's ability to proffer the
17 documents, but rather that the proffered documents establish, on
18 their own, nothing.

19 Rules 803 and 902 allow documents to be admitted into
20 evidence under certain circumstances, including that a custodian
21 testifies that the documents were found in the records under
22 ordinary circumstances. The document is then part of the
23 evidence. With respect to the -3597 Account, the only
24 documentary evidence provided was the Card Agreement which, on
25 its face, does not establish that Debtor was obligated to make
26 payments on -3597 Account. Not only is the Card Agreement not
signed by anyone on behalf of the Debtor, it does not even
reference the Debtor. It is rather an "exemplar" of what a
corporate credit card agreement would have looked like.

1 Defendant cites In re Moye, 2011 WL 4809322 (Bankr.S.D.Tex.
2 2010) for the proposition that "exemplars are competent summary
3 judgement evidence." However, that begs the question "of what?"
4 In Moye, the Master Agreement involved merely "evidences that
5 transfers of the Installment Contracts was something that would
6 not happen (if it was ever consummated) until there was further
7 documentation." Id. at 5. Similarly, the exemplar attached to
8 the Bennett declaration merely sets out the terms a company may
9 have entered into with Defendant. The exemplar on its own
10 establishes no such agreement as between the Company and
11 Defendant. Unlike Moye, the exemplar in this case does not even
12 name the account holder.

13 In an effort to connect the general Card Agreement to the
14 Debtor, Ms. Bennett declared "Citibank's records reflect that on
15 or about March 13, 2001, a Citi Platinum Select Aadvantage
16 Business Card credit card account ending in 3597 (the "Company
17 Account") was opened in the names of applicants Creative Capital
18 (the "Company") and David W. Winick ("Dwinick")." However, she
19 did not produce those records. Further, she could not have
20 first-hand knowledge of the March 13, 2001 transaction as she was
21 not with Defendant at the time.

22 Ms. Bennett also declared that "Exhibit A is a true and
23 correct exemplar of the terms and conditions governing the
24 Company Account (the "Card Agreement") at or about the time it
25 was opened." However, with no evidence that Debtor applied for
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1 or was issued such an account, the terms of the exemplar are
2 meaningless in this case.

3 Similarly, she declared "various authorized sub-accounts
4 beginning with the account number "5588" were issued at the
5 Company's request and, as a result, transactions on the 5588 sub-
6 accounts are included with and reflected on the Company Account,
7 which the Company was legally obligated to pay." However, she
8 does not declare that she has first-hand knowledge of the
9 Debtor's requests, and provides no records that so reflect.

10 In her supplemental affidavit, Ms. Bennett explains that
11 Citibank does not retain card agreements governing its credit
12 card accounts at an account level, but rather Card Agreements are
13 instead retained by portfolio and the governing card agreement is
14 determined by the date the account was opened and by portfolio.
15 That may well be accurate. However, we still have no evidence
16 that the Debtor ever applied for or obtained the credit account.

17 In short, the document attached to the Bennett affidavit
18 does not establish a contractual liability on the part of the
19 Debtor to make the payments on the -3597 Account. Ms. Bennett
20 has not provided admissible first-hand testimony that the Debtor
21 was liable or otherwise bound by the terms of the Credit
22 Agreement. Therefore, as to the -3597 Account, Defendant's
23 motion is denied.

24 **-7332 Account**

25 As to the -7332 Account, Defendant contends that the \$22,740
26 payment made by Debtor was a reimbursement to Michael Winick for

1 equipment purchased for the Debtor. Defendant argues that Debtor
2 had a legal obligation to make the payment, and hence it was made
3 for reasonably equivalent value. It does appear from Michael's
4 deposition transcript and the card statements that Michael
5 purchased equipment for the Debtor. As Defendant explains:

6 MWinick had an individual credit card account with
7 Citibank.... On August 8, 2005 Mwinick purchased
8 equipment for the Company from W.J. Strickler Signs,
9 Inc. For \$22,740 using the MWinick 7332 Account. On
August 30, 2005, the Company paid \$22,740 to Citibank
on the MWinick 7332 Account, which is reflected on the
September 2005 MWinick 7332 Account statement.

10 Motion at 3:20-26. However, there is no evidence that Debtor was
11 contractually or legally required to reimburse Michael for the
12 purchased equipment.

13 Defendant relies upon In re The SDR Capital Management,
14 Inc., 2008 WL 8188356 (Bankr.N.D.Cal. 2008), for the proposition
15 that Debtor was required to reimburse Michael for the purchase of
16 the equipment. However, that case was based upon § 317(d) of the
17 California Corporations Code which required reimbursement under
18 the particular facts of that case. As the court explained:

19 Under [section 317(d)], a corporation must reimburse a
20 person who is made a party to a "proceeding" growing
21 out of the person's actions as an "agent" of the
corporation if the agent prevails "on the merits."

22 *Id.* at 4. In this case there was no "proceeding" in which
23 Michael could "prevail on the merits." Section 317(d) does not
24 apply to our facts, so neither does SDR Capital.

25 Defendant also relies upon Corporations Code § 315(d), which
26 merely provides that "a corporation *may* advance money to a

1 director or officer of the corporation ... for an expense
2 reasonably anticipated...." (emphasis added). There is no
3 requirement of advancement or reimbursement in that section.

4 Defendant also cites to Labor Code § 2802 which provides:

5 An employer shall indemnify his or her employee for all
6 necessary expenditures or losses incurred by the
7 employee in direct consequence of the discharge of his
or her duties, or of his or her obedience to the
directions of the employer

8 However, Defendant has provided no evidence that Michael was an
9 employee of the Debtor, that he had any duties to the Debtor, nor
10 that Debtor directed him to purchase the equipment. None of the
11 statutes cited by Defendant establish that Debtor had a statutory
12 obligation to make the Payment.

13 Defendant's next effort is to establish that Debtor had a
14 contractual obligation to make the payment, relying on In re
15 Jeffery Bigelow Design Group, Incorporated, 956 F.2d 479 (4th.
16 Cir. 1992). This, too is unavailing. In Jeffery Bigelow, as in
17 this case, a corporation made payments on a line of credit in
18 favor of its shareholder. However, in that case the corporation
19 had a separate, but identical obligation running in favor of the
20 shareholder. As the court explained:

21 Although [Shareholder] was the maker of the line of
22 credit, only the debtor received the draws and all
23 payments were made directly from the debtor to [Bank].
24 [T]he debtor executed a note for \$1,000,000 to
25 [Shareholder] with substantially the same terms as the
line of credit between [Bank and Shareholder]. As the
debtor directly repaid [Bank], its liability on the
note to [Shareholder] likewise decreased....

26 Technically, a tripartite relationship exists,
where [Shareholder] is a creditor of the debtor and

1 [Bank] is a creditor of [Shareholder]. The debtor, in
2 making its payments, in effect skips its true creditor
3 and sends the money to [Bank], to whom it has no direct
obligation.

4 Id. at 481. Under this set of facts, the court held that the
5 debtor received reasonably equivalent value for the payments. Id.
6 at 485. In the case at hand, Defendant has provided no evidence
7 of any debt running from Debtor to Michael which would be reduced
8 by the payment by Debtor on Michael's credit card account.
9 Further, there is no evidence of any contractual agreement
10 requiring Debtor to make such payments.

11 However, while the Bigelow case is unavailing, there is
12 another Ninth Circuit case which, while perhaps an outlier in
13 constructive fraudulent conveyance jurisprudence, seems to
14 dictate the outcome here. In In re Northern Merchandise, Inc.,
15 371 F.3d 1056 (9th Circuit 2004)., the debtor business applied for
16 a secured loan from Frontier Bank. Frontier said "no," based on
17 the business' creditworthiness. However, the Bank said it would
18 make the loan to the business' shareholders (who were also its
19 officer and/or directors). The Bank took promissory notes from
20 the shareholders, and also received a security interest in the
21 business' inventory and assets, although there was no supporting
22 promissory note or other obligation running from the business to
23 the Bank. And, in sharp contract to Bigelow, there was no
24 corresponding liability running from the business to the
25 shareholders, either. The loan proceeds were deposited directly
26 into the debtor's operating account, and were used up by the time

1 the debtor closed its business. The Bank thereafter collected
2 funds from the liquidation of the inventory and other assets
3 pledged by the business. So, to summarize, the loan proceeds
4 were deposited directly into the debtor's account, but the
5 debtors had no contractual liability with anyone to repay those
6 funds - not to the Bank and not to the shareholders who
7 personally borrowed the funds and who gave the Bank promissory
8 notes for repayment. Then, the debtor's assets were liquidated
9 and the proceeds went to the Bank, even though the Bank held no
10 promise from the debtor to repay the funds, whether to the Bank
11 or anyone else - again, in contract to Bigelow.

12 The bankruptcy trustee brought an adversary proceeding
13 against the Bank to recover the funds collected from the debtor's
14 assets on the theory that the debtor did not receive reasonably
15 equivalent value for the security interest it gave the Bank
16 without any corresponding obligation running from the debtors to
17 the Bank. Both the bankruptcy court and the Ninth Circuit
18 Bankruptcy Appellate Panel agreed with the trustee and found the
19 transfer to be constructively fraudulent under 11 U.S.C. § 548.
20 A panel of the Ninth Circuit reversed.

21 The Ninth Circuit recognized that in Bigelow, because of the
22 debtor's obligation to its shareholders evidenced by a promissory
23 note, when the debtor directly repaid the bank, the liability of
24 the shareholders on their note to the bank decreased in a
25 corresponding amount, as did the liability of the debtor on
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1 its note to the shareholders. Then the court stated:

2 As Jeffrey Bigelow illustrates, the primary focus of section
3 548 is on the net effect of the transaction on the debtor's
4 estate and the funds available to the unsecured creditors.

5 371 F.3d at 1059. The court then reviewed the trustee's
6 position:

7 Trustee contends that Debtor's grant of the security
8 interest to Frontier resulted in a \$150,000 loss to Debtor's
9 estate and thus the funds available to the unsecured
10 creditors. Trustee reasons that because the transfer of
11 \$150,000 from shareholders to Debtor was technically
12 (emphasis added) a capital contribution, rather than a loan,
13 Debtor was under no legal obligation to grant a security
14 interest to Frontier.

15 Id. Without discussing at all the trustee's assertion of a
16 capital contribution, the court stated:

17 We reject this formalistic view. Although Debtor was not a
18 party to the October loan, it clearly received a benefit
19 from that loan.

20 Id. That was sufficient for the panel, although the result
21 appears inconsistent with the policy underlying § 548. First,
22 Frontier negotiated for and received promissory notes from the
23 debtor's shareholders, but not the debtor. Frontier had the full
24 panoply of its contractual rights on those notes as against the
25 shareholders. Frontier elected to not make the loan directly to
26 the debtor, although it presumably asked for, and received the
naked security interest in assets of the debtor, unaccompanied by
any underlying obligation of the debtor to pay the Bank anything.

When the Bank collected proceeds of the liquidation of
debtor's assets, it thereby used the debtor's assets to satisfy

1 in part the shareholder's obligations to the bank, reducing their
2 liability correspondingly. In effect, by allowing that to occur,
3 the court elevated the priority of the shareholders ahead of
4 unsecured creditors, contrary to the priority of creditors scheme
5 embodied in the Bankruptcy Code, and 11 U.S.C. § 507, in
6 particular. Interest holders such as shareholders generally get
7 what is left of an estate after all creditors get paid. Here,
8 funds that could have gone to creditors, instead were paid to
9 reduce the liability of shareholders, at the expense of the
10 creditors.

11 Which leaves the remaining point; the unaddressed argument
12 concerning the loan funds constituting a capital contribution by
13 the shareholders. We only know that the debtor was not a party
14 to the loan, and acknowledged no obligation to either the Bank or
15 the shareholders for receipt of the loan proceeds. There is
16 nothing in the appellate decision to show how debtors showed the
17 loan funds on its books. However, it is not at all uncommon for
18 a business, especially with a weak balance sheet, to purposely
19 seek capital contributions from its shareholders, partners or
20 members. That is because capital contributions make the business
21 appear stronger on its balance sheet. The capital contributions
22 are not debts or liabilities of a debtor, and are shown on the
23 equity side. In addition, the willingness of shareholders or
24 other interest holders to make capital contributions can be
25 encouraging to prospective lenders or investors because of their
26 equity position in the business. So, shareholders may

1 intentionally borrow money to make a capital infusion into a
2 business. Here, we know Frontier refused to make the loan on the
3 debtor's creditworthiness, but made the loan to the shareholders.
4 The shareholders agreed the funds would be deposited in the
5 business' account, but the shareholders did not ask the business
6 to promise to repay those funds, either to the shareholders
7 themselves or directly to the Bank.

8 For all the foregoing reasons, the Court has concerns about
9 the rationale and the results in the Northern Merchandise
10 decision. All of that said, however, it appears to remain the
11 law of the Ninth Circuit, which this Court is bound to follow.
12 The facts of this portion of this case are simpler than Northern
13 Merchandise. There is no dispute that Michael Winick used the
14 credit card in his name to purchase equipment to be used by
15 Creative Capital. Creative Capital paid the bill when it was
16 received approximately three weeks later, in the identical
17 amount. Under the rationale of Northern Merchandise, and
18 regardless of whether Creative Capital had any obligation to
19 reimburse Michael for the purchase, the debtor received the
20 benefit of the acquisition in the full amount of payment. Part
21 of the rationale adopted in Northern Merchandise, borrowed from
22 another court, states succinctly:

23 "If the consideration given to the third person has
24 ultimately landed in the debtor's hands, and if the giving
25 of consideration to the third person otherwise confers an
26 economic benefit upon the debtor, then the debtor's net
worth has been preserved, and [the statute] has been
satisfied - provided, of course, that the value of the
benefit received by the debtor approximates the value of the

1 property or obligation he has given up."

2 371 F.3d at 1058-59.

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CONCLUSION

4 For the foregoing reasons, the Court denies Defendant's
5 motion for partial summary judgment with respect to the payments
6 on the - 3597 Account, but grants the motion with respect to the
7 payment on the - 7332 Account.

8 Counsel for Defendant shall prepare and lodge, or obtain
9 approval as to form, an order consistent with the foregoing,
10 within fourteen (14) days of the date of entry of this Order.

11 IT IS SO ORDERED.

12 DATED: JAN 17 2013

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PETER W. BOWIE, Judge

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United States Bankruptcy Court

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