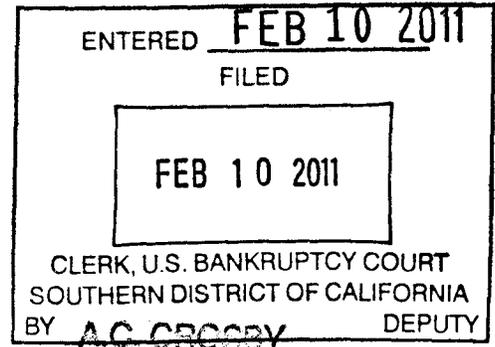


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 07-04977-PB7
12) Adv. No. 09-90457
13 CREATIVE CAPITAL LEASING)
14 GROUP, LLC,)
15 Debtor.) ORDER ON CROSS MOTIONS
16) FOR SUMMARY ADJUDICATION
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21 This matter came on regularly for hearing on both the

22 trustee's motion for summary adjudication and Bank of America's

23 motion for summary judgment. Many of the underlying facts are

24 not in dispute and are simply stated. David Winick was the sole

25 member of Creative Capital Leasing from around May 1, 1999

26 forward. David Winick applied for five credit cards, in his own

1 name and, ostensibly, for his own purposes. So far as appears
2 from the records in this matter, the card issuers relied only on
3 Mr. Winick's credit status in making its determinations to extend
4 credit to him through the accounts. There was a sixth account
5 set up in the names of Winick and the debtor, as joint
6 applicants. That account is not at issue in this proceeding.

7 What is at issue is that Mr. Winick used monies he borrowed
8 on the credit accounts to put into Creative Capital's accounts,
9 although not always. Then, periodically he would cause Creative
10 Capital to make payments to the card issuers on the respective
11 accounts. Those prepetition payments by Creative Capital to the
12 card issuers totalled \$952,377.54, on accounts Creative Capital
13 had no obligation to pay. The instant motions turn on whether
14 Creative Capital received reasonably equivalent value for those
15 transfers, such that the bank has no obligation to refund them to
16 the bankruptcy estate. Obviously, the trustee contends Creative
17 Capital did not receive reasonably equivalent value because it
18 had no obligation to make any payments to the bank on those
19 accounts. The bank counters that Creative Capital did receive
20 equivalent value because almost all the funds Mr. Winick borrowed
21 on the five accounts can be traced to deposits made by Winick to
22 Creative Capital's accounts. The bank then advances two
23 arguments: 1) the deposits by Winick to Creative Capital's
24 accounts were loans by Winick, not capital contributions;
25 and 2) Creative Capital received the indirect benefit of those
26 ///

1 borrowed funds and should not be allowed to say it did not
2 receive reasonably equivalent value.

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

7 The trustee relies on the First Circuit's decision in
8 In re Rowanoak Corp., 344 F.3d 126 (2003). There, debtor's
9 principal, Ms. Murphy, ran the Rowanoak Corporation, which
10 acted as a general contractor while subcontracting out all the
11 work. During Rowanoak's Chapter 7 case, the trustee learned
12 of prepetition payments made by Rowanoak to Ms. Walsh, who was
13 Ms. Murphy's mother. The trustee sued to recover those payments
14 as fraudulent conveyances, while mother and daughter contended
15 Ms. Walsh had made loans to Rowanoak and the payments by
16 Rowanoak were repayments of some of those loans. After taking
17 evidence, the court found that all the cancelled checks issued
18 by the mother were payable to the daughter, not to Rowanoak
19 Corporation. There was no evidence of any promissory note,
20 security interest, mortgage or other documents evidencing a
21 loan from Ms. Walsh to the corporation. Rowanoak's tax returns
22 did not show any loan liability owed by the corporation to
23 Ms. Walsh. The appellate court also noted that even if there
24 were bank statements showing deposits to the corporation's
25 account traceable in some way to Ms. Walsh's checks to her
26 daughter:

1 Walsh could have given or loaned money to
2 Murphy individually. Simply because Murphy
3 then chose to deposit the funds into
4 Rowanoak's bank account would not prove that
5 Walsh loaned the funds to Rowanoak. Rowanoak
6 and Murphy are two separate legal entities,
7 and a gift or loan to one does not equate to
8 a loan to the other.

9 344 F.3d at 132-33.

10 The bank, in turn, relies on a Fourth Circuit decision,
11 In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479 (1992).
12 There, the facts were quite different. Debtor's 50% equity
13 interest holder acquired its interest by a combination of a cash
14 payment and arrangement with the bank for a line of credit for
15 the express benefit of the debtor. The line of credit was
16 personally guaranteed by the principals of the equity interest
17 holder, and while the equity interest holder was nominally the
18 borrower, "only the debtor received the draws and all payments
19 were made directly from the debtor to [the bank]." 956 F.2d at
20 481. About five months after the line of credit was set up with
21 the bank, the debtor executed a promissory note in favor of the
22 equity interest holder, on substantially the same terms as the
23 line of credit. When the debtor made payments directly to the
24 bank on the line of credit, the balance due on the note to the
25 equity interest holder was decreased. The appellate court summed
26 up the factual circumstances as follows:

Technically, a tripartite relationship
exists, where Donatelli & Klein [equity
interest holder] is a creditor of the debtor
and First American is a creditor of Donatelli
& Klein. The debtor, in making its payments,

1 in effect skips its true creditor and sends
2 the money to First American, to whom it has
3 no direct obligation.

3 956 F.2d at 481.

4 Interestingly, the Bigelow opinion discusses the concept of
5 "reasonably equivalent value" in very broad terms - much broader
6 than the facts of the case support. The court quoted one writer
7 as stating:

8 Reasonably equivalent value is not
9 susceptible to simple formulation
10 The focus is on the consideration received
11 by the debtor, not on the value given by
12 the transferee.

11 956 F.2d at 484. The court continued:

12 Hence, the proper focus is on the net effect
13 of the transfers on the debtor's estate,
14 the funds available to the unsecured
15 creditors. As long as the unsecured
16 creditors are no worse off because the
17 debtor, and consequently the estate, has
18 received an amount reasonably equivalent
19 to what it paid, no fraudulent transfer has
20 occurred.

17 956 F.2d at 484.

18 With all due respect, this Court is persuaded that taken on
19 its face, the foregoing statement is way overbroad, and ignores
20 the legal implications of how the funds came into the debtor's
21 possession. A classic example is the capital contribution of an
22 equity interest holder, who borrowed the money to purchase the
23 equity interest, and then causes the debtor to repay the loan
24 when the debtor has no obligation to pay that amount to either
25 the borrower or the lender. The equity interest holder who makes
26 a capital contribution receives the appropriate consideration in

1 the entity's reflection on its books of the capital account
2 contribution. Any further pay out by the debtor entity to the
3 lender is a depletion of the debtor's assets that the debtor
4 had no obligation to make, thereby reducing the estate to which
5 the unsecured creditors could look, to borrow the vernacular of
6 Bigelow.

7 The bank also relies on the Ninth Circuit's decision in
8 Bauer v. C.I.R., 748 F.2d 1365 (1985). There, the issue was
9 whether payments made "by two stockholders to their wholly-owned
10 corporation were loans or contributions to capital." 748 F.2d
11 at 1366. The important facts were that the books of the
12 corporation showed the funds as loans, and "periodic payments
13 by the corporation as principal and interest payments to the
14 stockholders." Id. Further: "The corporation deducted the
15 interest payments and the stockholders declared the interest
16 payments as income and treated the principal payments as a return
17 of capital." Id. The court elaborated:

18 The parties treated all of the
19 transactions as loans and repayments.
20 Each advance to Federal was evidenced
21 by a negotiable promissory note that
22 was unsecured and was payable on demand.

23 748 F.2d at 1367. The notes all carried a specified per annum
24 interest rate. Moreover:

25 For each advance made to Federal, an
26 amount representing "accrued interest
payable" was entered in the corporate
ledger at the end of each month as an
addition to liabilities in the form of
"outstanding loans payable - officers."
. . . On its financial statements,

1 Federal included the outstanding
2 balances as a current liability labeled
3 "loan payable - officers."

3 Id.

4 The Bauer court noted that Congress had authorized the
5 Secretary of the Treasury to adopt regulations establishing
6 factors to be used in deciding whether a payment was for debt or
7 equity. Because the regulations were not issued until after the
8 payments at issue, the court looked to the factors the Congress
9 set out in its enabling legislation, and to the factors the court
10 had identified in prior years. The court repeated 11 factors:

11 (1) the names given to the certificates
12 evidencing the indebtedness; (2) the presence
13 or absence of a maturity date; (3) the source
14 of the payments; (4) the right to enforce the
15 payment of principal and interest; (5)
16 participation in management; (6) a status
17 equal to or inferior to that of regular
18 corporate creditors; (7) the intent of the
19 parties; (8) "thin" or adequate
20 capitalization; (9) identity of interest
21 between creditor and stockholder; (10)
22 payment of interest only out of "dividend"
23 money; and (11) the ability of the
24 corporation to obtain loans from outside
25 lending institutions.

19 748 F.2d at 1368. The court explained: "No one factor is
20 controlling or decisive, and the court must look to the
21 particular circumstances of each case. . . . 'The object of the
22 inquiry is not to count factors, but to evaluate them.' . . .
23 The burden of establishing that the advances were loans rather
24 than capital contributions rests with the taxpayer." Id.

25 Ultimately, in Bauer, the Ninth Circuit had little
26 difficulty reversing the Tax Court's finding that the advances to

1 the corporation were not loans but rather contributions to
2 capital. In doing so, it noted that even "the Tax Court
3 conceded: the existence of notes; fixed and reasonable interest
4 rates; actual timely payment of interest, corresponding treatment
5 of the interest as income by Bauer and Himmelfarb;"
6 748 F.2d at 1370-71.

7 Simply stated, the Court disagrees with the bank's argument
8 that somehow the Bauer factors support its claim that the funds
9 winick deposited to Creative Capital's account were really loans,
10 not capital contributions. To the contrary, the Court is
11 persuaded by the uncontroverted evidence that Creative Capital
12 booked the deposits as capital contributions. There is no
13 evidence of any promissory notes or security interests granted
14 to Winick in return for the deposits. There is no evidence of
15 any terms of a hypothetical note, such as interest rate,
16 duration, and repayment of principal. Looking at the Bauer
17 factors, they strongly support the conclusion that winick's
18 deposits into Creative Capital were capital contributions, not
19 loans.

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Conclusion

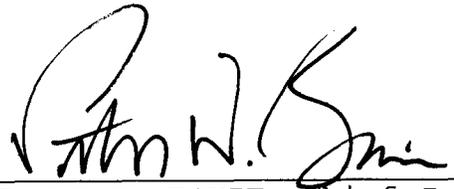
Because the Court finds and concludes, without any controverting evidence, that Winick's deposits into Creative Capital from the funds he borrowed from the bank through his personal credit lines were contributions to capital, not loans, the payments made by Creative Capital to the bank on Winick's accounts depleted the assets available to Creative's unsecured creditors while not paying on any obligation owed by Creative Capital. Creative Capital, therefore, did not receive reasonably equivalent value for the payments it made to the bank.

Accordingly, the trustee's motion for summary adjudication on that issue shall be, and hereby is granted. For the same reasons, the bank's cross-motion for summary judgment is hereby denied.

The Court will separately notice a continued status conference in this matter.

IT IS SO ORDERED.

DATED: FEB 10 2011



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court