Preferential Transfer
Trustee's Strong-Arm Powers
Code § 544(a)(3)

Roost v. Scott and Norman
In re Patricia Parker

BAP No. OR-00-1074-BKMa
Adv. No. 98-6311-fra
Bk. No. 697-64879-fra7

12/15/00 BAP aff'g Alley Unpublished

Scott and Norman are the third-party defendants in an action brought by the Trustee against Defendant John Wilber who is the ex-husband of the Debtor. Prior to bankruptcy, the Defendant and the Debtor divorced, with the divorce decree incorporating a stipulated property settlement between the parties. The decree ordered that certain real property was awarded to the Defendant and required the Debtor to execute the necessary documents to effectuate the transfer. The Debtor executed and delivered to Defendant a deed to the property and then filed bankruptcy. The deed was recorded within 90 days prior to Debtor's petition date. Trustee sought to recover the Debtor's interest in the property as a preferential transfer and by using the strong-arm powers of § 544(a)(3)once the recording was avoided as preferential. The Trustee filed a motion for summary judgment and the third-party defendants filed a cross-motion for summary judgment, to which the Defendant joined. The Bankruptcy Court granted summary judgment to Defendant and third-party defendants and denied summary judgment to Trustee. Trustee appealed.

The BAP agreed with the Bankruptcy Court that a decree of dissolution does not create an antecedent debt; absent an antecedent debt, a transfer made subject to the decree cannot be attacked as preferential. Instead, the filing of a petition for dissolution of marriage under Oregon law creates "a species of coownership" which is considered a partitioning of jointly owned property and should be treated in the same manner as a resulting trust.

Because the recording of the deed could not be avoided as preferential, Trustee could not avoid the transfer under § 544(a)(3). Even if the deed had not been recorded, the Trustee would have succeeded only to the bare legal title to the property with the obligation to transfer the property to the defendant Wilber.

E00-17(11)

Underlying opinion is at
E99-23(10)

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE NINTH CIRCUIT

In re: PATRICIA A. PARKER, Debtor.	BAP No. OR-00-1074-BKMa Bk. No. 697-64879-fra7
ERIC R.-T. ROOST, Trustee, Appellant, v. ROBERT T. SCOTT and GARY E. NORMAN, individually and as shareholders in SCOTT & NORMAN, P.C., a professional corporation, Appellees.	Adv. No. 98-06311-fra M E M O R A N D U M[1]

FILED

DEC 15 2000

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on October 12, 2000
at Eugene, Oregon

Filed - December 15, 2000

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN, and MARLAR, Bankruptcy Judges

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

The bankruptcy court denied plaintiff's motion for summary judgment and granted third-party defendants' motion for summary judgment on the trustee's complaint to avoid as preferential the recording of a deed from debtor to her ex-husband within 90 days of filing. We AFFIRM.

I. FACTS

The facts are undisputed. Debtor Patricia A. Parker and John R. Wilber divorced in May 1997 pursuant to a stipulated decree of dissolution of marriage entered in Benton County Circuit Court. The decree awarded Wilber real property located at 322 South Main Street, Jefferson, Marion County, Oregon ("Jefferson Property"), and awarded the couple's residence ("Residential Property") to the debtor. In anticipation of the stipulated decree, on 17 April 1997 the debtor executed and delivered to Wilber a deed to debtor's one-half interest in the Jefferson Property. The same day, Wilber executed and delivered a deed conveying his one-half interest in the Residential Property to Parker.

On 22 April 1997, Wilber's attorney inadvertently recorded the deed to the Jefferson Property in Linn, rather than Marion, County. Debtor executed and delivered another deed on 23 May 1997, which was recorded in Marion County on 9 June 1997. Parker filed her petition for relief under chapter 7[2] on 22 August 1997.

The trustee, Eric R.-T. Roost, filed a complaint seeking avoidance of the 9 June transfer as preferential under § 547, and as constructively fraudulent under § 548(a)(1)(B). The complaint also

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[2] Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "ORS" refers to the Oregon Revised Statutes.

sought sale of the entire property free of Wilber's interest. The trustee later added a claim for avoidance of Wilber's one-half interest in the Jefferson Property, asserting the trustee's strong-arm powers as a bona fide purchaser under § 544(a)(3). Wilber filed a third-party complaint against his attorneys, Robert T. Scott and Gary E. Norman and their professional corporation (collectively, "Scott" or "appellees"), alleging negligence in the untimely recording of the deed.

The trustee moved for summary judgment; appellees filed a cross-motion which Wilber joined. During the course of the summary judgment proceedings the trustee conceded that the fraudulent transfer claim should be dismissed. The bankruptcy court granted appellees' motion for summary judgment, and entered judgment in favor of defendants. In re Parker, 241 B.R. 722 (Bankr. D. Or. 1999). This appeal ensued.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1),(b)(2)(C), (H), and (K), and we do under 28 U.S.C. § 158(c).

III. ISSUES

A. Whether the bankruptcy court should be affirmed on procedural grounds.

B. Whether the bankruptcy court erred in ruling that the recording of the deed was not preferential because:

1. the transfer was not on account of an antecedent debt, and because

2. Wilber did not receive more than he would have in a chapter 7 had the transfer not been made.

IV. STANDARD OF REVIEW

We review summary judgment de novo, Baldwin v. Kilpatrick (In re Baldwin), 245 B.R. 131, 134 (9th Cir. BAP 2000), viewing the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact, and whether the trial court correctly applied relevant substantive law. Graulty v. Brooks (Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 819 F.2d 214, 215 (9th Cir. 1987). We may uphold summary judgment on any basis supported by the record. See Jonas v. Resolution Trust Corp. (In re Comark), 971 F.2d 322, 324 (9th Cir. 1992).

V. DISCUSSION

A. Procedural Grounds.

Appellees argue that the bankruptcy court should be affirmed on procedural grounds because the trustee appealed only the bankruptcy court's grant of summary judgment to Scott and not its grant of summary judgment to Wilber. Appellees reason that the judgment in favor of Wilber stands because it was not appealed, therefore Wilber's claim for legal malpractice evaporates.

This issue is a red herring: the bankruptcy court entered one judgment, presented by appellees, referencing the entire action, ordering that plaintiff take nothing. The notice of appeal, which was timely, states that the appeal is from the final judgment of the bankruptcy court entered 22 December 1999 and names both Wilber and Scott as parties to the appeal. The notice of appeal asserts that the bankruptcy court erred in granting the third-party defendant's motion

for summary judgment and denying plaintiff's motion for summary judgment, and does not mention Wilber. As Wilber joined the third-party defendants' response and cross-motion, and so was a party to those motions, we will review the merits.

B. Preferential Transfer.

Section 547(b) provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made-
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if-
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

A transfer is treated as having been made at the time of transfer if the transfer is perfected within ten days; if perfected outside the ten-day period, the transfer is deemed to have been made when perfected. § 547(e)(2). A transfer of real property is perfected "when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee." § 547(e)(1)(A). Under Oregon law, a bona fide purchaser's rights are cut off when a deed is

recorded, or when circumstances would put the purchaser on inquiry notice of a problem with title. See Gorzeman v. Thompson, 162 Or. App. 84, 93, 986 P.2d 29, 34 (1999).

There is no dispute that the deed was recorded within 90 days of filing, nor is there a dispute over insolvency, which is presumed during that time period.

The bankruptcy court found that Wilber was not a creditor, and that the transfer was not on account of an antecedent debt. In addition, the bankruptcy court found that the transfer did not enable Wilber to receive more than he would have in a chapter 7 had the transfer not been made. We agree with the bankruptcy court's reasoning.

1. Not on account of an antecedent debt.

The bankruptcy court held that, as a matter of law, a division of marital property under Oregon law by way of a non-collusive decree of dissolution is not avoidable as a preferential transfer. Under Oregon law, a transfer of marital assets pursuant to a decree of dissolution is considered a partition of jointly owned property.[3] The bankruptcy court reasoned that a partition of jointly owned property is not a transfer on account of an antecedent debt. Moreover, property division pursuant to a decree of dissolution is an equitable distribution by the court, not

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[3] ORS § 107.105(f) provides in part:

> Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of coownership, and a transfer of marital assets under a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.

a remedy for breach of performance, and therefore was not on account of a "claim" as defined in the Code.[4]

The bankruptcy court reasoned that the transfer of real property by the decree could not be on account of a debt created by the decree itself. In addition, there was no prior obligation of the debtor that could give rise to a claim; thus, no antecedent debt. See Raleigh v. Haskell (In re Haskell), 1998 WL 809520, at *10-11 (Bankr. N.D. Ill. 1998), and Barnhill v. Vaudreuil (In re Busconi), 177 B.R. 153, 159 (Bankr. D. Mass. 1995).

We do not read the bankruptcy court's opinion as asserting there was no transfer, rather that there was no transfer on account of an antecedent debt, see Parker, 241 B.R. at 725, and need not address the trustee's argument that the bankruptcy court erroneously found no transfer. The parties do not otherwise dispute that a transfer occurred, and rightly so. Under Oregon law, a property division is deemed effective for all purposes upon entry of the dissolution decree.

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[4] "claim" means —

. . . .

right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

§ 101(5).

ORS § 107.105(i)(3).[5] The bankruptcy court correctly concluded that this ended its inquiry as to the existence of an antecedent debt.

The trustee does not otherwise dispute the bankruptcy court's interpretation of Oregon law, but points out that under Ninth Circuit law, a transfer perfected outside the ten-day safe harbor of § 547(e)(2)(A) is deemed to have been made on account of an antecedent debt. Grover v. Gulino (In re Gulino), 779 F.2d 546, 551-552 (9th Cir. 1985). See also Long v. Joe Romania Chevrolet, Inc. (In re Loken), 175 B.R. 56, 60 (9th Cir. BAP 1994).

Although the bankruptcy court's opinion does not attempt to reconcile Gulino and Loken, those cases are distinguishable because, in each, there was an antecedent contract that created a debtor-creditor relationship. Here, the dissolution decree effected an equitable distribution of property; it did not give rise to a claim or create a debtor-creditor relationship.

The late recording could not create a debt where none previously existed, nor make the transfer on account of an antecedent debt; perfection is simply irrelevant.

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[5] That subsection provides:

> Upon the filing of the decree, the property division ordered shall be deemed effective for all purposes. This transfer by decree, which shall effect solely owned property transferred to the other spouse as well as commonly owned property in the same manner as would a declaration of a resulting trust in favor of the spouse to whom the property is awarded, shall not be deemed a taxable sale or exchange.

2. Not more than in a chapter 7.

The trustee's second argument is that the transfer allowed Wilber to receive more than he would have in a chapter 7 liquidation because, had the transfer not been recorded, it would be avoidable under § 544(a)(3). We need not consider this argument for two reasons: it was not raised before the bankruptcy court, see Parker v. Community First Bank (In re Bakersfield Westar Ambulance, Inc.), 123 F.3d 1243, 1248 (9th Cir. 1997), and because the deed was recorded. In any event, the trustee cites no authority to support that argument, and we find none.

Next, ORS § 107.105(i)(3) provides that a transfer by dissolution decree creates a resulting trust.[6] As noted by the bankruptcy court, without the recording, the estate would have succeeded only to the debtor's bare legal title, see § 541(d), which was subject to the decree's provision awarding the property to Wilber. See Grassmueck, Inc. v. Food Indus. Credit Union, 127 B.R. 869, 872 (Bankr. D. Or. 1991). The trustee would have been obligated to distribute the property to Wilber, just as the debtor was.

The trustee's reliance on Grassmueck, Inc. v. Clearwater-Thompson (In re Clearwater), 1997 WL 101975 (Bankr. D. Or. 1997), in which the bankruptcy court allowed the chapter 7 trustee to avoid the transfer of

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[6] Upon the filing of the decree, the property division ordered shall be deemed effective for all purposes. This transfer by decree, which shall effect solely owned property transferred to the other spouse as well as commonly owned property in the same manner as would a declaration of a resulting trust in favor of the spouse to whom the property is awarded, shall not be deemed a taxable sale or exchange.

ORS § 107.105(i)(3).

a husband's interest in real property to his wife pursuant to a divorce decree, is misplaced. There, the deed was recorded after the petition date. Here, because of the pre-petition recording, a bona fide purchaser would be on notice of the transfer, and could not take an interest superior to the transferee.

The trustee must prove all elements of a preference before the strong arm powers come into play: he cannot overlap the two provisions without fully proving one first. The bankruptcy court properly rejected this argument as attempting to "weld together" two separate Code provisions to avoid the combined effects of the divorce decree, the delivery of the deed, and the recording.

3. Other arguments.

Appellees proffer two additional arguments to support their position that they were entitled to summary judgment: first, that the trustee had inquiry notice of the transfer, and second, that the transfer was intended to be a contemporaneous exchange for new value. Because we affirm the bankruptcy court's grant of summary judgment on the grounds stated above, we need not decide these issues.

Finally, the trustee conceded at oral argument that his § 544(a)(3) theory depended upon avoiding the recording as preferential. Given our conclusion above, we need not decide this issue.

VI. CONCLUSION

The bankruptcy court correctly ruled that, under Oregon law, the recording of the deed to the Jefferson Property was not on account of an antecedent debt, and that the transfer did not allow Wilber to receive

more than he would have in a chapter 7 had the transfer not occurred. We AFFIRM.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-00-1074-BKMa

RE: PATRICIA A. PARKER

A separate Judgment was entered in this case on December 15, 2000.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Patti Ippolito

Deputy Clerk: December 15, 2000