

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Unpublished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)

1 **NOT FOR PUBLICATION**

2 **UNITED STATES BANKRUPTCY APPELLATE PANEL**

3 **FOR THE NINTH CIRCUIT**

4
5 In re:) BAP No. OR-00-1074-BKMa

6 PATRICIA A. PARKER,)

7 Debtor.)

Bk. No. 697-64879-fra7

8 ERIC R.-T. ROOST, Trustee,)

Adv. No. 98-06311-fra

9 Appellant,)

10 v.)

M E M O R A N D U M¹

11 ROBERT T. SCOTT and GARY E.)
12 NORMAN, individually and as)
13 shareholders in SCOTT &)
14 NORMAN, P.C., a professional)
15 corporation,)

FILED

DEC 15 2000 *ai*

16 Appellees.)

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

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

19 Filed - December 15, 2000

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

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

23 Before: BRANDT, KLEIN, and MARLAR, Bankruptcy Judges

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25
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27 ¹ This disposition is not appropriate for publication and may
28 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.

1 The bankruptcy court denied plaintiff's motion for summary judgment
2 and granted third-party defendants' motion for summary judgment on the
3 trustee's complaint to avoid as preferential the recording of a deed
4 from debtor to her ex-husband within 90 days of filing. We AFFIRM.
5

6 I. FACTS

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

18 On 22 April 1997, Wilber's attorney inadvertently recorded the deed
19 to the Jefferson Property in Linn, rather than Marion, County. Debtor
20 executed and delivered another deed on 23 May 1997, which was recorded
21 in Marion County on 9 June 1997. Parker filed her petition for relief
22 under chapter 7² on 22 August 1997.

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

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

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

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

14 15 II. JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
17 § 157(b)(1), (b)(2)(C), (H), and (K), and we do under 28 U.S.C. § 158(c).
18

19 III. ISSUES

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

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

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

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

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1 IV. STANDARD OF REVIEW

2 We review summary judgment de novo, Baldwin v. Kilpatrick (In re
3 Baldwin), 245 B.R. 131, 134 (9th Cir. BAP 2000), viewing the evidence in
4 the light most favorable to the nonmoving party to determine whether
5 there are any genuine issues of material fact, and whether the trial
6 court correctly applied relevant substantive law. Graulty v. Brooks
7 (Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 819 F.2d
8 214, 215 (9th Cir. 1987). We may uphold summary judgment on any basis
9 supported by the record. See Jonas v. Resolution Trust Corp. (In re
10 Comark), 971 F.2d 322, 324 (9th Cir. 1992).

11
12 V. DISCUSSION

13
14 A. Procedural Grounds.

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

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

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

5
6 **B. Preferential Transfer.**

7 Section 547(b) provides:

8 Except as provided in subsection (c) of this
9 section, the trustee may avoid any transfer of an
interest of the debtor in property-

- 10 (1) to or for the benefit of a creditor;
11 (2) for or on account of an antecedent debt
owed by the debtor before such transfer was made;
12 (3) made while the debtor was insolvent;
13 (4) made-

14 (A) on or within 90 days before the date
of the filing of the petition; or

15 (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

16 (5) that enables such creditor to receive more
than such creditor would receive if-

17 (A) the case were a case under chapter 7
of this title;

18 (B) the transfer had not been made; and

19 (C) such creditor received payment of
such debt to the extent provided by the provisions
of this title.

20 A transfer is treated as having been made at the time of transfer
21 if the transfer is perfected within ten days; if perfected outside the
22 ten-day period, the transfer is deemed to have been made when perfected.
23 § 547(e) (2). A transfer of real property is perfected "when a bona fide
24 purchaser of such property from the debtor against whom applicable law
25 permits such transfer to be perfected cannot acquire an interest that is
26 superior to the interest of the transferee." § 547(e) (1) (A). Under
27 Oregon law, a bona fide purchaser's rights are cut off when a deed is
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1 recorded, or when circumstances would put the purchaser on inquiry
2 notice of a problem with title. See Gorzeman v. Thompson, 162 Or. App.
3 84, 93, 986 P.2d 29, 34 (1999).

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

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

12
13 **1. Not on account of an antecedent debt.**

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

22
23 ³ ORS § 107.105(f) provides in part:

24 Subsequent to the filing of a petition for
25 annulment or dissolution of marriage or separation,
26 the rights of the parties in the marital assets
27 shall be considered a species of coownership, and a
28 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.

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

3 The bankruptcy court reasoned that the transfer of real property by
4 the decree could not be on account of a debt created by the decree
5 itself. In addition, there was no prior obligation of the debtor that
6 could give rise to a claim; thus, no antecedent debt. See Raleigh v.
7 Haskell (In re Haskell), 1998 WL 809520, at *10-11 (Bankr. N.D. Ill.
8 1998), and Barnhill v. Vaudreuil (In re Busconi), 177 B.R. 153, 159
9 (Bankr. D. Mass. 1995).

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

23 ⁴ "claim" means -
24
25 right to an equitable remedy for breach of
26 performance if such breach gives rise to a right to
27 payment, whether or not such right to an equitable
remedy is reduced to judgment, fixed, contingent,
matured, unmatured, disputed, undisputed, secured,
or unsecured.

28 § 101(5).

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

3 The trustee does not otherwise dispute the bankruptcy court's
4 interpretation of Oregon law, but points out that under Ninth Circuit
5 law, a transfer perfected outside the ten-day safe harbor of
6 § 547(e)(2)(A) is deemed to have been made on account of an antecedent
7 debt. Grover v. Gulino (In re Gulino), 779 F.2d 546, 551-552 (9th Cir.
8 1985). See also Long v. Joe Romania Chevrolet, Inc. (In re Loken),
9 175 B.R. 56, 60 (9th Cir. BAP 1994).

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

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

22
23 ⁵ That subsection provides:

24 Upon the filing of the decree, the
25 property division ordered shall be deemed effective
26 for all purposes. This transfer by decree, which
27 shall effect solely owned property transferred to
28 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.

1 2. Not more than in a chapter 7.

2 The trustee's second argument is that the transfer allowed Wilber
3 to receive more than he would have in a chapter 7 liquidation because,
4 had the transfer not been recorded, it would be avoidable under
5 § 544(a)(3). We need not consider this argument for two reasons: it
6 was not raised before the bankruptcy court, see Parker v. Community
7 First Bank (In re Bakersfield Westar Ambulance, Inc.), 123 F.3d 1243,
8 1248 (9th Cir. 1997), and because the deed was recorded. In any event,
9 the trustee cites no authority to support that argument, and we find
10 none.

11 Next, ORS § 107.105(i)(3) provides that a transfer by dissolution
12 decree creates a resulting trust.⁶ As noted by the bankruptcy court,
13 without the recording, the estate would have succeeded only to the
14 debtor's bare legal title, see § 541(d), which was subject to the
15 decree's provision awarding the property to Wilber. See Grassmueck,
16 Inc. v. Food Indus. Credit Union, 127 B.R. 869, 872 (Bankr. D. Or.
17 1991). The trustee would have been obligated to distribute the property
18 to Wilber, just as the debtor was.

19 The trustee's reliance on Grassmueck, Inc. v. Clearwater-Thompson
20 (In re Clearwater), 1997 WL 101975 (Bankr. D. Or. 1997), in which the
21 bankruptcy court allowed the chapter 7 trustee to avoid the transfer of
22

23 ⁶ Upon the filing of the decree, the property
24 division ordered shall be deemed effective for all
25 purposes. This transfer by decree, which shall
26 effect solely owned property transferred to the
27 other spouse as well as commonly owned property in
28 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.

28 ORS § 107.105(i)(3).

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

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

12 **3. Other arguments.**

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

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

22
23 **VI. CONCLUSION**

24 The bankruptcy court correctly ruled that, under Oregon law, the
25 recording of the deed to the Jefferson Property was not on account of an
26 antecedent debt, and that the transfer did not allow Wilber to receive
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1 more than he would have in a chapter 7 had the transfer not occurred.
2 We AFFIRM.

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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