

11 U.S.C. § 547(b)

11 U.S.C. § 549

Interest of the debtor in property

Miles v. Sticka (In Re Stratton) BAP # OR-03-1413-MaMoH
Adv.No. 01-6216-aer Main Case No. 00-66349-aer7

May 27, 2004 Bankruptcy Appellate Panel Unpublished
(reversing Radcliffe - no underlying written opinion)

The Chapter 7 trustee sued debtor's former mother-in-law to avoid an alleged preferential trust deed on debtor's former marital residence. The trust deed (as well as an underlying note) was given as settlement of a suit (on a separate note executed 5 years before) brought by the mother-in-law against the debtor and her then husband. The new note was to be paid (and the lien satisfied) from the sale or refinance of the marital residence (awarded to debtor's ex-husband) per debtor's divorce decree. Debtor was given an equalization judgment for half the equity in the residence from the proceeds upon sale or refinance.

Debtor refused to execute a deed of her interest in the former marital residence to her former husband, so the state divorce court ordered the court clerk to sign an "Interspousal Transfer Grant Deed" on her behalf. The Interspousal Deed was executed and recorded three days before debtor filed her Chapter 7 petition. Ten months later, debtor's former mother-in-law recorded her trust deed.

After a trial on stipulated fact, the bankruptcy court held the trust deed avoidable as preferential under §547 and its recordation as violative of §549. The Bankruptcy Appellate Panel reversed.

The Panel held that because Debtor's interest in the marital residence was divested by her divorce and recordation of the Interspousal Deed pre bankruptcy, the residence did not fall within the ambit of "interest of the debtor in property" as set out in §547(b) and thus the unrecorded lien on the residence did not "transfer" anything prior to the bankruptcy. Likewise, because Debtor had no interest in the residence at the time of the filing of her petition, no transfer of the residence occurred when the trust deed was recorded. Finally, because the residence was not property of the estate, the trust deed's post-petition recording was not an unauthorized post-petition transfer under §549.

MAY 27 2004

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)
JUDITH M. STRATTON,)
Debtor.)
_____)
CONCETTA MILES,)
Appellant,)
v.)
RONALD R. STICKA, Trustee,)
Appellee.)
_____)

BAP No. OR-03-1413-MaMoH
Bk. No. 00-66349-aer7
Adv. No. 01-06216-aer

MEMORANDUM¹

Argued and Submitted on February 20, 2004
at Las Vegas, Nevada

Filed - May 27, 2004

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

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding

Before: MARLAR, MONTALI and HAINES,² Bankruptcy Judges.

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.

² Hon. Randolph J. Haines, Bankruptcy Judge for the District of Arizona, sitting by designation.

1 **FACTS**

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3 **A. The "Old Note"**

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5 In 1993, Frank Miles ("Frank") and his wife, Judith³
6 ("Judith"), signed a note ("the 1993 Note") in favor of Frank's
7 mother, Concetta Miles ("Concetta"), from whom they had borrowed
8 \$120,500. It was secured by a deed of trust against their
9 community property residence ("the residence"), located in Orange
10 County, California. However, in 1998, the deed of trust was
11 reconveyed, relegating Concetta to the status of an unsecured
12 creditor for the unpaid balance.

13
14 **B. Divorce Proceedings/Concetta's Lawsuit**

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16 In August of 1998, Judith sued Frank for divorce.

17 One month later, in September of 1998, Concetta commenced a
18 lawsuit against Frank and Judith to recover the debt evidenced by
19 the 1993 Note.

20 On October 22, 1999, a stipulated judgment was entered and
21 incorporated within the divorce case, as part of a settlement of
22 Concetta's lawsuit. The Stipulated Judgment provided that Frank
23 and Judith acknowledged a debt owing to Concetta in the amount of
24 \$106,500, resulting from the balance due under the 1993 Note, and
25 that the debt was to be once again secured by the residence.

26 As part of the settlement, Frank and Judith executed a

27
28 ³ Judith is now known as Judith Stratton, and the chapter
7 debtor.

1 promissory note dated December 1, 1999 in the sum of \$106,500
2 ("the 1999 Note") to replace the 1993 Note, and granted Concetta a
3 new deed of trust against the residence ("the 1999 Trust Deed").
4 These documents were signed by Frank and Judith while they were
5 still husband and wife. Concetta did not record the 1999 Trust
6 Deed at that time.

7 The divorce proceeding continued until May 22, 2000, when a
8 final divorce decree was entered. The divorce decree awarded the
9 residence to Frank, with Judith's share of the equity to be paid
10 as part of a hoped-for sale or refinance:

11 The residence located at 22111 Comanche Road, Lake
12 Forest, CA. is awarded to the Respondent [Frank] at a
13 value of \$335,000.00 subject to his qualifying for a re-
14 finance of the First Deed and Second Trust Deed
15 obligations and Petitioner's [Judith's] one-half
16 equalization payment. The property shall be refinanced
17 on or before April 1, 2000. On April 1, 2000, the
18 property shall be listed and sold at the best terms and
19 conditions. The court reserves the right to define the
20 terms and conditions of the sale.

21 The "First Trust Deed" holder referred to above is intended to be
22 Concetta, based upon the 1999 Trust Deed (still unrecorded at the
23 time the decree was entered).

24 On May 22, 2000, the state court entered an order requiring
25 Judith to sign and deliver her deed to the residence to Bank of
26 America on or before May 24, 2000 to assist in effectuating the
27 refinancing that had not been completed. Judith refused, so on
28 October 12, 2000, the state court ordered the court clerk to sign
an Interspousal Transfer Grant Deed on behalf of Judith
transferring title of the residence to Frank. On October 24,
2000, the Interspousal Transfer Grant Deed was recorded. The deed

1 itself contained no qualifying or restrictive language.⁴ At this
2 time, Frank had still not refinanced the residence as required by
3 the Divorce Decree. In addition, Concetta had still not yet
4 recorded the new Trust Deed.

5
6 **C. Judith's Bankruptcy**

7
8 Three days after Frank recorded the deed to the residence as
9 his sole and separate property, on October 27, 2000, Judith filed
10 a voluntary chapter 7⁵ bankruptcy petition in the District of
11 Oregon. Ten months later, on August 24, 2001, Concetta recorded
12 the 1999 Trust Deed.

13 Thereafter, Ronald R. Sticka, the chapter 7 trustee
14 ("Trustee"), filed an "Amended Complaint to Recover Preferential
15 Transfer and Post-Petition Transfer" against Concetta. The
16 Complaint alleged that within one year before Judith filed for
17 bankruptcy, she had transferred a security interest in the
18 residence to Concetta on account of an antecedent debt owed by
19 Judith to Concetta, at a time when Judith was insolvent. The
20 Complaint also alleged that after the filing of Judith's
21 bankruptcy petition, Concetta recorded the lien, but that such act
22 was void as against Judith's interest.

23 Concetta answered, admitting the late recordation of the lien
24

25 ⁴ Judith had no "equitable" claims against the residence
26 that were evident on the public record. Any claims related to the
Decree were enforceable by contempt, not by an action against the
real property.

27 ⁵ Unless otherwise indicated, all chapter, section and
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 and that it was given to secure a pre-existing loan owed to
2 Concetta from Frank and Judith. Concetta denied the balance of
3 the allegations.

4 On November 7, 2002, the bankruptcy court held a trial on
5 stipulated facts, and on June 16, 2003, the bankruptcy court
6 announced its ruling in favor of the Trustee. On June 25, 2003,
7 the bankruptcy court entered a Judgment ordering that the transfer
8 of the lien to Concetta be avoided and preserved for the benefit
9 of the bankruptcy estate.

10 Concetta timely appealed.

11
12 **ISSUES**

- 13
14 1. Whether the court erred in avoiding the pre-petition
15 lien as a preferential transfer?
16
17 2. Whether the court properly avoided the recording of the
18 1999 Trust Deed as a post-petition transfer?
19

20 **STANDARD OF REVIEW**

21
22 Questions of law are reviewed *de novo*. Rubenstein v. Ball
23 Bros., (In re New England Fish Co.), 749 F.2d 1277 (9th Cir.
24 1984). Questions of fact are reviewed under the clearly erroneous
25 standard. Fed. R. Bankr. P. 8013; Matter of Metz, 820 F.2d 1495,
26 1497 (9th Cir. 1987). "The nature of the debtor's interest in
27 property, although largely a question of fact, is based on the
28 interpretation of legal principles." In re Keller, 185 BR 796,

1 798 (9th Cir. BAP 1995). "Mixed questions of law and fact that
2 require the consideration of legal concepts and involve the
3 exercise of judgment about the values underlying legal principles
4 are reviewable *de novo*.'" In re Roosevelt, 176 BR 200, 204 (9th
5 Cir. BAP 1994) (quoting Mayors v. C.I.R., 785 F.2d 757, 759 (9th
6 Cir. 1986)).

7 Since this matter was submitted to the bankruptcy court on
8 stipulated facts, the application of the pertinent legal
9 principles is reviewable *de novo*.

10

11

DISCUSSION

12

13 Concetta seeks reversal of the bankruptcy court's Judgment
14 avoiding the transfer of the lien to her. She claims that the
15 1999 Trust Deed was on property that was awarded pre-petition to
16 the non-debtor spouse (Frank) in a state court marriage
17 dissolution. Concetta contends that the imposition of the lien
18 represented by the 1999 Trust Deed on the residence was not a
19 transfer of an interest of Debtor in property for purposes of
20 § 547 and the post-petition recording of the 1999 Trust Deed did
21 not involve property of the estate for purposes of § 549.

22 In response, the Trustee maintains that the intervening
23 divorce has no bearing upon whether Concetta received a
24 preferential transfer at a time when Judith did have an ownership
25 interest in the residence. The Trustee points to two things: (1)
26 the court should look to the time of the attachment of the lien
27 for avoidance purposes; and (2) regardless of when the transfer is
28 determined to have occurred, Judith maintained a legal and/or

1 equitable interest in the residence as of the filing of her
2 bankruptcy petition because the conditions precedent to divest her
3 of entitlement (sale or refinance and payment of equity) had not
4 occurred when she filed her bankruptcy case.

5

6 **A. Preference**

7

8 Under § 547(b), the basic applicable elements under which a
9 trustee may avoid any transfer of an interest of the debtor in
10 property are: (1) a transfer to or for the benefit of a creditor;
11 (2) for or on account of an antecedent debt owed by the debtor
12 before such transfer was made; (3) made while the debtor was
13 insolvent; (4) made - (A) on or within 90 days before the date of
14 the filing of the petition; or (B) between ninety days and one
15 year before the date of the filing of the petition, if such a
16 creditor at the time of such transfer was an insider; and (5) that
17 enables such creditor to receive more than such creditor would
18 receive if (A) the case were a case under chapter 7 of this title;
19 and (B) the transfer had not been made. Unless the trustee proves
20 all of the elements of § 547, the transfer is not avoidable as a
21 preference. Danning v. Bozek (In re Bullion Reserve of N. Am.),
22 836 F.2d 1214, 1217 (9th Cir.), cert. denied, 486 U.S. 1056, 108
23 S. Ct. 2824, 100 L. Ed. 2d 925 (1988).

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1 Interest of the Debtor in Property

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3 A transfer is preferential only if the property transferred
4 belongs to the debtor.⁶

5 The Code does not define "interest of the debtor in
6 property." The Supreme Court has interpreted the term to mean
7 "that property that would have been part of the estate had it not
8 been transferred before the commencement of bankruptcy
9 proceedings." Begier v. IRS, 496 U.S. 53, 58, 110 S. Ct. 2258,
10 2263, 110 L. Ed. 2d 46, 56 (1990). The court looks to state law
11 to determine whether property is an asset of a debtor. Griffel v.
12 Murphy (In re Wegner), 839 F.2d 533, 538 (9th Cir. 1988).

13 Concetta claims that because the state court, prior to the
14 bankruptcy filing, ordered the court clerk to sign an Interspousal
15 Transfer Grant Deed, transferring Judith's interest in the
16 residence to Frank, the residence was not an "interest of the
17 debtor in property."

18 The Trustee argues that despite the recording of the
19 Interspousal Transfer Grant Deed three days before Judith's
20 bankruptcy filing, Judith still maintained an equitable, if not
21 legal, interest in the residence on the date that her bankruptcy
22 petition was filed. The Trustee contends that the Interspousal
23 Transfer Grant Deed was executed and recorded to facilitate the
24 sale and division of the value of the residence, as was required
25 under the Divorce Decree.

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27 ⁶ Here, the transfer at issue is the lien given in favor
28 of Concetta on the residence. Neither party disputes that the
lien was a transfer for purposes of § 547.

1 According to the Stipulation of Agreed Facts ("Stipulation"),
2 the Divorce Decree states that the residence was awarded to Frank
3 subject to Judith receiving her one-half equalization payment.

4 The Interspousal Transfer Grant Deed states:

5 It is the express intent of the grantor, being the
6 spouse of the grantee, to convey all right, title and
7 interest of the grantor, community or otherwise, in and
8 to the herein described property to the grantee as
9 his/her sole and separate property

8 The purpose behind the Interspousal Transfer Grant Deed (as
9 evidenced by the Divorce Decree) was to allow Frank to sell or
10 refinance the residence and give Judith her "one-half equalization
11 payment." However, it is clear that Judith did not maintain an
12 interest in the residence itself. True, Judith maintained a legal
13 interest in the one-half equalization payment expected to flow
14 from the proceeds of the property's sale or refinance, pursuant to
15 the Divorce Decree, but the residence *itself* was deeded to Frank
16 as his "sole and separate property."

17 Therefore, while the residence would have been property of
18 the estate had it not been transferred prior to the filing of the
19 bankruptcy, Judith's intervening divorce, and the recording of the
20 Interspousal Transfer Grant Deed, divested Judith of her interest
21 in the residence. Therefore, the residence was not, as of the
22 date of Judith's bankruptcy, an interest of the debtor in
23 property. As a result, an unrecorded lien on that residence did
24 not "transfer" anything prior to the bankruptcy.

25 At the time she signed the 1999 Trust Deed, Judith had an
26 interest in the residence. By the time she filed bankruptcy,
27 however, that interest had been transferred to Frank. Thus, at
28 the moment she filed bankruptcy, Judith only had a right to her

1 "equalization payment" of one-half of the net proceeds and no
2 further rights in or to the residence itself.

3 The Trustee must prove all of the elements of § 547 in order
4 for the transfer to be avoidable as a preference. Judith had no
5 interest in the residence at the time of the filing of her
6 bankruptcy petition and therefore no transfer of the residence
7 occurred when the 1999 Trust Deed, given by Frank and Judith in
8 favor of Concetta, was recorded. Indeed, the estate's interest
9 had not been impaired, because Judith's previous right to a one-
10 half interest in the residence was converted into a right to half
11 of the net proceeds upon sale or refinance. Accordingly, the lien
12 given to Concetta on the residence is not avoidable as a
13 preference under § 547.

14

15 **B. § 549 Unauthorized Post-Petition Transfers**

16

17 Under § 549 the trustee may avoid a transfer of property of
18 the estate that occurs after the commencement of the case.⁷

19 Concetta contends that the Interspousal Transfer Grant Deed,
20 transferring all of Judith's interest in the residence to Frank,
21 was recorded pre-petition. That fact is not in dispute. She
22 maintains that because the Interspousal Transfer Grant Deed was
23 recorded pre-petition, Judith had no interest in the residence at
24 the time of the filing of her bankruptcy petition or at anytime
25 thereafter. This is disputed by the Trustee.

26

27 ⁷ There are two non-applicable authorized transfers under
28 § 549, §§ 303(f) and 542(c). Neither apply nor were raised on
appeal.

1 Many months after Judith filed her bankruptcy petition,
2 Concetta recorded the security interest in the residence. The
3 Trustee claims that such lien created an interest in the
4 residence, which thus interfered with Judith's rights to receive
5 otherwise unencumbered proceeds. In response to Concetta's
6 argument, the Trustee also contends that Judith maintains an
7 interest in the residence, which remains property of her
8 bankruptcy estate. On this point, the Trustee is incorrect.

9

10 Transfer of Property of the Estate

11

12 The same issue that was analyzed under § 547 is relevant
13 here, namely, whether the residence was property of Judith's
14 estate at the time of the filing of her bankruptcy petition. For
15 the same reasons as presented under the § 547 analysis, this prong
16 has not been satisfied. Therefore, because at the time of the
17 filing of Judith's bankruptcy petition, she had been divested of
18 her interest in the residence by virtue of the Interspousal
19 Transfer Grant Deed, Judith had no interest in the residence, and
20 thus there was no transfer of property of the estate when Concetta
21 recorded her lien on August 24, 2001.

22 Because the residence was not property of the debtor's
23 estate, the recording of the lien is not an unauthorized post-
24 petition transfer under § 549.

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CONCLUSION

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Because all of the elements of a preferential transfer were not satisfied, Concetta's 1999 Trust Deed is not avoidable by the Trustee under § 547. Because all of the elements of a post-petition transfer were not satisfied, the deed of trust is similarly not avoidable by the Trustee under § 549. Accordingly, we REVERSE.