

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

3 Roost v. John Wilber
4 In re Patricia Parker

98-6311-fra
697-64879-fra7

5 11/3/99

FRA

Published

6 Defendant is the ex-husband of the Debtor. Prior to
7 bankruptcy, the Defendant and the Debtor divorced, with the
8 divorce decree incorporating a stipulated property settlement
9 between the parties. The decree ordered that certain real
10 property was awarded to the Defendant and required the Debtor to
11 execute the necessary documents to effectuate the transfer. The
12 Debtor executed and delivered to Defendant a deed to the property
13 and then filed bankruptcy. The deed was recorded within 90 days
14 prior to Debtor's petition date. Trustee sought to recover the
15 Debtor's interest in the property as a preferential transfer and
16 by using the strong-arm powers of § 544(a)(3). The Trustee filed
17 a motion for summary judgment and Defendant filed a cross-motion
18 for summary judgment.

19 The trustee conceded that under state law, the equitable
20 interest in the property was transferred to Defendant when the
21 divorce decree was entered and that avoidance of the transfer
22 (recordation of the deed) under § 547 would only put him in the
23 Debtor's shoes as the holder of bare legal title to the property.
24 However, he argued that avoidance of the transfer under § 547
25 would retroactively eliminate the recording of the deed for
26 notice purposes of § 544(a)(3). As a hypothetical bona fide
purchaser at the petition date without notice of the transfer
made by the divorce decree, his interest would then trump the
Defendant's.

The court held that property division made by a non-
collusive divorce decree does not as a matter of law create a
debtor/creditor relationship which may later be attacked as a
preferential transfer. Further, the Debtor had done everything
she was required to do by way of transfer of the property, so
there was no "antecedent debt" to which the transfer related
under § 547. Even if the transfer could be avoided under § 547,
it would not retroactively avoid the notice effect of the
recording for purposes of §544(a)(3). Summary judgment granted
to Defendant.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)	
)	
PATRICIA A. PARKER,)	Case No. 697-64879-fra7
)	
<u>Debtor.</u>)	
)	
ERIC R.-T ROOST, TRUSTEE)	Adv. Proc. No. 98-6311-fra
)	
Plaintiff,)	
)	
v.)	
)	
JOHN B. WILBER,)	OPINION
)	
Defendant and 3d)	
Party Plaintiff,)	
)	
v.)	
)	
ROBERT SCOTT, GARY NORMAN,)	
AND SCOTT & NORMAN, PC,)	
)	
<u>3d Party Defendants.)</u>)	

Plaintiff filed a motion for summary judgment on counts I and III of his complaint. Defendant filed a response to Plaintiff's motion and, through the motions of third-party defendants, a cross-motion for summary judgment on all counts.

1 For the reasons that follow, Plaintiff's motion for summary
2 judgment will be denied and Defendant's motion for summary
3 judgment will be granted.

4 BACKGROUND

5 The essential facts in this case are a matter of public
6 record, and are not disputed. The Debtor and Defendant (Debtor's
7 ex-husband) divorced in May 1997 pursuant to a stipulated decree
8 of dissolution entered in Benton County Circuit Court. The
9 decree awarded the subject real property located in Jefferson to
10 the Defendant. In anticipation of the stipulated decree, the
11 Debtor on April 17, 1997 executed and delivered to Defendant a
12 deed to Debtor's one-half interest in the real property. The
13 deed was filed in the wrong county, so the Debtor was required to
14 execute and deliver another deed on May 23, 1997. The second
15 deed was recorded in Marion County on June 9, 1997. The Debtor
16 then filed bankruptcy on August 22, 1997.

17 Complaint and Amendments

18 The Trustee's complaint sets out three claims for relief: 1)
19 avoidance of the June 9 transfer as a preferential transfer under
20 Code § 547, 2) avoidance of the June 9 transfer as constructively
21 fraudulent under § 548(a)(1)(B), and 3) sale of the entire
22 property free of the interest of the Defendant. In his
23 memorandum in support of his motion, the Trustee moved to add a
24 fourth claim for relief: avoidance of Defendant's one-half
25 interest in the real property under the trustee's strong-arm
26 powers as a bona fide purchaser under Code § 544(a)(3). The

1 Trustee also conceded, in response to the Defendant's cross-
2 motion for summary judgment, that Count II, alleging a fraudulent
3 transfer, should be dismissed.

4 DISCUSSION

5 Motion for Summary Judgment

6 As noted, Plaintiff, Defendant, and Third-Party Defendants
7 all seek entry of a judgment as a matter of law, pursuant to Fed
8 R. Bankr. P. 7056 and Fed R. Civ. P. 56. The rule provides that
9 judgment must be entered in favor of a party which demonstrates
10 that "there is no genuine issue as to any material fact and that
11 the moving party is entitled to a judgment as a matter of law."
12 I find that there is no dispute as to the material facts, and
13 that Defendant prevails as a matter of law.

14 Preferential Transfer

15 In order to avoid the June 9 transfer as preferential under
16 § 547, the Plaintiff must prove the following elements:

17 (b) Except as provided in subsection (c) of this
18 section, the trustee may avoid any transfer of an
interest of the debtor in property—

- 19 (1) to or for the benefit of a creditor;
20 (2) for or on account of an antecedent debt owed
21 by the debtor before such transfer was made;
22 (3) made while the debtor was insolvent;
23 (4) made—
24 (A) on or within 90 days before the date of
the filing of the petition; or
25 (B) between ninety days and one year before
26 the date of the filing of the petition, if
such creditor at the time of such transfer

1 was an insider; and

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

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

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

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

10 All elements of § 547 must be present in order to avoid the
11 transfer. Because the transfer (the recording of the deed on
12 June 9) was not made to a creditor, or on account of an
13 antecedent debt, the Trustee's claim under § 547 must fail.

14 A "debt" is defined by the Code at § 101(12) as "liability
15 on a claim." Under the Code there are two types of claim. The
16 first type is a right to payment. Because the transfer that the
17 Trustee seeks to set aside was a conveyance of an interest in
18 real property, the first type of claim does not apply in this
19 case.

20 The second type of claim is a "right to an equitable remedy
21 for breach of performance if such breach gives rise to a right to
22 payment, whether or not such right to an equitable remedy is
23 reduced to judgment, fixed, contingent, matured, unmatured,
24 disputed, undisputed, secured, or unsecured." 11 U.S.C. §
25 101(5) (B).

26 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. Oregon law provides that

1 Subsequent to the filing of a petition for
2 annulment or dissolution of marriage or
3 separation, the rights of the parties in the
4 marital assets shall be considered a species
5 of coownership, and a transfer of marital
6 assets pursuant to a decree of annulment or
7 dissolution....shall be considered a
8 partition of jointly owned property. ¹

9 O.R.S. 107.105. The property distribution is deemed effective
10 "for all purposes" when the decree is filed. O. R. S.
11 107.105(3).

12 A "partition of jointly held property" is not a transfer on
13 account of a debt, antecedent or otherwise. The effect of a
14 decree of dissolution is to make a determination of the rights of
15 the parties in such property, in light of the requirement of
16 O.R.S. 105.107 that such property be equitably divided between
17 them. The determination, and the consequent division of assets,
18 do not constitute a transfer to a creditor on account of an
19 antecedent debt. See In re Sorlucco, 66 B.R. 748, 752 (Bankr. D.
20 N.H. 1986) (a divorce court's jurisdiction to dispose of property
21 is not based on the parties' debts or legal rights to property,
22 but is incident to its power to dissolve their marriage), In re
Perry, 131 B. R. 763, 766 (Bankr. D. Mass 1991), In re
Compagnone, ___ B. R. ___, 1999 WL 900580 (Bankr. D. Mass
9/21/1999). Divorce proceedings in Massachusetts, like those in

23 ¹The phrase "marital assets" describes any property, real or personal,
24 acquired by either of the parties to the marriage, or both, during the
25 marriage. Matter of Marriage of Troffo, 151 Or. App. 741, 951 P.2d 197
26 (1997). The Defendant's affidavit says that he has maintained his
business on the subject property since 1995 or 1996, strongly
suggesting that it was acquired some time after the parties'
marriage in 1982.

1 Oregon, are equitable in nature. Compagnone, at slip p. 3.
2 The Compagnone and Perry courts held that the equitable rights
3 of each party in property held by either arises in the context of
4 the dissolution, and depends on the equities of the case. The
5 rule is the same in Oregon. Oregon Courts are required to
6 distribute property in a manner that is "just and proper in all
7 the circumstances." O.R.S. 107.105(1)(f). In so doing, Oregon
8 courts attempt to disentangle the parties' finances, and to leave
9 them, as much as possible, independent of each other. Matter of
10 Marriage of Short, 155 Or. App. 5, 15, 964 P.2d 1033, 1039
11 (1998). The division of property is not an award "for breach of
12 performance," and is therefore not a claim under Code §
13 101(5)(B). The division of marital property is not intended as
14 satisfaction of any claims, or to remedy breaches of prior
15 duties. See Matter of Marriage of Koch, 58 Or. App. 252, 648
16 P.2d 406 (1982) (Court has no authority to award damages for
17 injuries sustained by one spouse at the hands of the other).
18 Property division does not give rise to a claim under Code
19 §101(5)(B), and parties to whom property is awarded are not
20 creditors under Code §101(10).

21 At the time the deed was recorded, the Debtor's interest was
22 subject to the decree's provision that the property was
23 distributed to the Defendant. The transfer by decree has the
24 same effect as a transfer creating a resulting trust. O.R.S.
25 107.105(3). Therefore, the estate's interest, had the deed not
26 been recorded, would be limited to the bare legal title, subject

1 to the Debtor's obligation to convey the property absolutely to
2 the Defendant. Grassmueck, Inc. v. Food Industry Credit Union,
3 127 B. R. 869, 872 (Bankr. D. Or. 1991). It follows that the
4 transfer did not allow Defendant to receive more than he would
5 had the deed not been recorded: he would be entitled to the same
6 conveyance from the Trustee as he eventually got from the Debtor.

7 Finally, the Trustee argues that Defendant was a creditor,
8 because the divorce decree requires Debtor to hold the Defendant
9 harmless from various obligations. The record does not establish
10 that Debtor had failed to comply with this requirement, so as to
11 create a claim in favor of Defendant. Moreover, the transfer of
12 the real property by the decree cannot be said to be "on account
13 of" debts created by the decree itself.

14 In addition, it appears that there was no "breach of
15 performance" by the Debtor which would give rise to a right to
16 payment (i.e. she did everything she was required to do under
17 state law and the divorce decree). Having actually received the
18 deed from Debtor, the Defendant thereafter had no claim against
19 the Debtor and there was, therefore, no antecedent debt. See
20 Raleigh v. Haskell (In re Haskell), 1998 WL 809520 (Bankr. N.D.
21 Ill. 1998) (citing to Busconi v. Vaudreuil, 177 B.R. 153, 159
22 (Bankr. D. Mass. 1995)).

23 Lien Avoidance Under § 544(a)(3)

24 The Trustee concedes that under state law the Debtor
25 possessed only a legal, and not an equitable, interest in the
26 property at the time the deed was recorded in Marion County.

1 Thus, were the Trustee able to avoid the June 9 transfer as
2 preferential², he would step into the shoes of the Debtor with
3 respect to the property and possess only the legal interest in
4 the property with the obligation to convey it to the Defendant.
5 Coming to this conclusion himself, the Trustee seeks to add a
6 fourth claim for relief to his complaint³ to avoid the June 9
7 transfer under Code § 544(a)(3). As I understand the Trustee's
8 argument, he may first avoid the transfer of the legal interest
9 in the property as preferential under § 547. He then steps into
10 the shoes of a hypothetical bona fide purchaser of the property
11 which perfected its interest in the property at the petition date
12 without notice of the Debtor's transfer of her equitable one-half
13 interest in the property to the Defendant. See Code §544.

14 The Trustee relies on In re Clearwater, 1997 WL 101975
15 (Bankr. D. Or. 1997)⁴. Clearwater involved a property settlement
16 agreement which was incorporated in a dissolution judgment. The
17 judgment required that the parties execute all documents
18 necessary to effect the transfer of property called for in the
19 agreement, including certain jointly held property awarded to the
20 wife. The husband did not file the required documents prior to
21 filing bankruptcy and the trustee sought to use the strong-arm

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23 ² Which, as discussed earlier, he is not able to do.

24 ³ Because it does not affect the outcome, I discuss the merits of the
25 new Count IV despite the irregularity of including a motion to amend the
26 complaint in the middle of a memorandum in support of a motion for summary
judgment, and the filing of the amended complaint without leave.

⁴The case is reported in Westlaw, but not the Bankruptcy Reporter.

1 powers of § 544(a) (3) to avoid the transfer of the husband's
2 interest in the property to the wife. The court concluded that a
3 hypothetical bona fide purchaser of the property would not have
4 had constructive notice at the petition date of the transfer of
5 husband's interest in the property which had been effected by the
6 dissolution judgment. The trustee thus succeeded to a one-half
7 interest in the subject property.

8 In the present case, unlike Clearwater, the transfer was
9 perfected prior to the petition date by the June 9 recording of
10 the deed in Marion County. A bona fide purchaser at the petition
11 date would be on notice of the transfer and could not take an
12 interest superior to the transferee.

13 In effect, the Trustee is trying to take parts of two
14 separate Code Sections and weld them together in order to avoid
15 the effects of the decree, the delivery of the deed, and its
16 subsequent transfer. He contends that, once the recording is set
17 aside as a preference under § 547, he can then employ § 544
18 (a) (3) to roll back and avoid the delivery and the decree as
19 could a bona fide purchaser whose interest arose before any deed
20 had been recorded. However, avoidance of the perfection of a
21 transfer under Code §547 does not operate retroactively so as to
22 allow avoidance of the original transfer under §544(a) (3). The
23 deed actually was recorded at the date of the petition for
24 relief, and cannot be avoided under § 544. Even if the June 9
25 transfer could later be avoided as preferential, that would not
26 automatically eliminate the notice effect of the recording for

1 purposes of a hypothetical bona fide purchaser at the petition
2 date.

3 CONCLUSION

4 The Trustee cannot make a prima facie case under 11 U.S.C. §
5 547 under his first claim for relief and has conceded that his
6 second claim for relief should be dismissed. The fourth claim
7 for relief is also untenable, and must be denied. An order will
8 therefore be entered denying Trustee's motion for summary
9 judgment and granting Defendant's cross-motion for summary
10 judgment.⁵

11 Counsel for Third-Party Defendants shall submit a form of
12 judgment consistent with this opinion.

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16 FRANK R. ALLEY, III
17 Bankruptcy Judge
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24 ⁵The Trustee has filed a motion to strike certain affidavits, or
25 portions of affidavits, submitted in support of Defendant's and Third-Party
26 Defendants' motions. The allegations attacked by the motion were not
necessary to this decision. However, the motion was not timely, and should be
denied.