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NOT FOR PUBLICATION



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re)
Tigran Boyadzhyan,)
Debtor.)
_____)
David Gottlieb, Chapter 7 Trustee)
Plaintiff,)
v.)
Akop Boyadzhyan,)
Defendant.)
_____)

Case No. SV 03-19614 KT
Chapter 7
Adv. No. SV 04-01163 MT

MEMORANDUM OF DECISION

Date: September 29, 2005
Time: 9:30 a.m.
Place: Courtroom 302

Introduction

All parties have appeared in this action and are subject to the jurisdiction of this Court. This court has jurisdiction over the instant action. David Gottlieb (“Trustee”) is the duly appointed Chapter 7 Trustee for the Estate of Tigran Boyadzhyan.

The Trustee brought a fraudulent transfer action under 11 U.S.C. § 544 and Cal. Civ. Code § 3439.04 based on Debtor’s transfer of real property and improvements thereon located at 7047 Mary Ellen Ave., North Hollywood to his brother, Akop Boyadzhyan (hereafter “Akop”).

Debtor filed his voluntary Chapter 7 bankruptcy case on November 23, 2004.

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Procedural Background

Before trial, Trustee filed a motion *in limine* to exclude parol evidence on the interpretation of the grant deed. Although the grant deed stated that Debtor’s transfer of real property was a “bonafide gift,” Defendant wished to admit extrinsic evidence to show that the transfer was really in satisfaction of a loan made in Armenia 16 years ago. Oral argument was heard on this issue on August 10, 2005 and on August 17, 2005 the motion *in limine* was granted in its entirety. The order provided that the “Notarized Agreement” identified in the Joint Pre-Trial Order as Defendant’s Exhibit 1 was not to be offered or admitted into evidence and no other evidence, whether documentary or testimonial, was to be offered or admitted into evidence for purposes of contradicting, varying, explaining or interpreting the terms of the deed for the transfer of the Property to Defendant, or pertaining to the facts or circumstances leading to the execution and recordation of the deed.

The California parol evidence rule, codified under Cal. Civ. Proc. § 1856, specifically applies to deeds. Cal. Civ. Proc. § 1856(h). Thus, this rule applies to the grant deed in this case. As noted from the bench, the grant deed was a fully integrated, final expression of the parties, and was unambiguous. As such, it would be improper to consider parol evidence in interpreting the deed. See In re Bennett, 298 F.3d 1059, 1064 (9th Cir. 2002); Baker v. Ramirez, 190 Cal. App. 3d 1123, 1134 (Cal. App. 1987); Safwenberg v. Marquez, 50 Cal. App. 3d 301, 306 (Cal. App. 1978). Defendant argued that he does not read English and did not know what the grant deed said. Such evidence is not admissible under controlling precedent. See Arboireau v. Adidas-Salomon AG, 347 F.3d 1158, 1164-65 (9th Cir. 2003) (interpreting Oregon law to require that when a sophisticated party chooses to contract in the English language, that party may not use difficulties with the English language as an excuse to avoid the implications of the contract); Pacific State Bank v. Greene, 110 Cal. App. 4th 375, 393

1 (Cal. App. 2003) (approving the maxim that a party who signs a contract “cannot
2 complain of unfamiliarity with the language of the instrument”).

3 **Findings of Fact**

4 Based on the undisputed facts in the pretrial order, the testimony at trial and the
5 exhibits introduced at trial, I make the following findings of fact.

6 Tigran Boyadzhyan (hereafter “Tigran”) came to the United States from Armenia
7 in 1988. Tigran ran his own carpet cleaning business, and appears to have done well at
8 first. He bought a house at 6857 Mammoth Ave., Van Nuys, California. He resides
9 there now, and has claimed a \$75,000 homestead exemption in this property in his
10 Chapter 7 bankruptcy.

11 Debtor also purchased a house at 7047 Mary Ellen Ave., North Hollywood,
12 California (“Property”). On or about June 4, 2001, Debtor transferred this Property to
13 his brother, Akop.

14 Tigran’s health problems appear to have started at least as early as February
15 2001. He was originally admitted to Valley Presbyterian Hospital on February 10,
16 2001. He was subsequently transferred to Kaiser Hospital in Panorama City on
17 February 16, 2001. On February 28, 2001, he underwent a cardiac catheterization and
18 the placement of a cardiac defibrillator.

19 According to a letter from his doctor, Sami Azzam, M.D., (Exhibit 7), Tigran’s
20 “hospital stay was complicated with lung infection due to ventilator machine.” During
21 this hospital stay, “he received full resuscitation on the respiratory and circulatory
22 support and he recovered slowly. He remained in anoxic encephalopathy and his
23 memory gradually improved. However he had significant impairment of his calculation
24 and memory, and up to now, he is unable to participate in any work activities.” (See id.)

25 Neither the Debtor, Tigran, nor his brother, Akop, disputed Dr. Azzam’s findings.
26 In fact, they both appeared to be very concerned about Tigran’s health. Tigran testified
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1 that he understood that he would be going back to work at some point after he received
2 the pacemaker. He stated that he thought he was getting better following his first
3 hospitalization, but could not provide any detail or basis for why he believed that. When
4 asked what his doctors told him to make him believe that, he said merely that the
5 doctors said he *might* get better, and he became quite defensive and non-responsive
6 when asked anything else on this topic.

7 On June 4, 2001, Debtor recorded a Grant Deed evidencing and effectuating the
8 transfer with the Los Angeles County Recorder's Office. The Grant Deed states that the
9 transfer was a "bonafide gift" and the "grantor received nothing in return." In addition,
10 Debtor testified in his deposition that he reviewed the grant deed, knew what it said and
11 knew that the deed stated the transfer of his house was a gift. (Tigran Boyadzhyan
12 Depo. p. 31).

13 At the time of the transfer, the Property had a value of approximately \$170,000 to
14 \$240,000. At this time, there was a first deed of trust on the Property in favor of
15 Washington Mutual in the amount of approximately \$58,000, on which the Debtor was
16 solely liable. While the earlier *in limine* ruling precluded testimony Defendant wanted to
17 introduce concerning a debt Tigran owed to Akop arising in Armenia, Akop testified that
18 he had made the mortgage payments on the Property through the payments he gave
19 Tigran each month to enable Tigran to pay his bills. He did not provide any details
20 concerning how many payments or how much was paid.

21 Debtor's tax returns for the year 2001 show he had an adjusted gross income of
22 \$4,424 for 2001. At or around the time of the transfer of the Property, Debtor had credit
23 card debts slightly in excess of \$15,000. At and before the time of the transfer, Debtor
24 was unemployed. Akop testified that he had to help his brother pay his bills at this time
25 as well as later. How frequently he did this was unclear.
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1 Akop is the older brother and has a wife and three children. He was visibly upset
2 when testifying about his brother Tigran's habits back in 2001. Akop was concerned
3 about Tigran's gambling and drinking and sometimes followed Tigran to see what he
4 was doing. Akop stated that he had to make sure the bills were paid on time. While he
5 claimed that Tigran had money from his savings from years of working, Akop said he
6 still had to make sure Tigran handled his money responsibly.

7 Tigran sustained a full cardiac arrest on June 10, 2001 at home. He was revived
8 with CPR by paramedics who were called to the house and placed him on a ventilator.
9 He remained in a coma for a few weeks thereafter.

10 Following this second hospitalization, Tigran's financial situation worsened along
11 with his health. While his unsecured debt in June 2001 was approximately \$15,000, it
12 had climbed to \$146,000 by the time he filed bankruptcy in November 2004.

13 While both Tigran and Akop testified through an Armenian interpreter, they did
14 start answering a few of the questions when they were posed in English before the
15 interpreter had completed his translation into Armenian. Both Tigran and Akop
16 continuously argued with the Trustee's counsel or refused to answer questions directly.
17 While Tigran has a documented medical condition resulting in problems with his
18 memory, he did appear to recollect events selectively and to just throw answers out
19 without really thinking or attempting to recall any details. Akop testified generally about
20 how much money he lent his brother, and attempted to portray the house transfer as a
21 formality because he had been paying for it all along, but he would simply answer "I
22 don't remember" when asked anything specific. When the Trustee's counsel attempted
23 a number of times to inquire into how much money Akop actually lent his brother, Akop
24 answered "I don't remember - and that's it," and simply refused to answer questions.
25 He also disputed whether any of these transfers of money between the brothers were
26 "lending" money, and just insisted he had a duty to take care of his brother.
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Conclusions of Law

Pursuant to 11 U.S.C. § 544(b), the trustee may avoid any transfer of an interest of the debtor in property that is voidable under applicable law by a creditor holding an unsecured claim. California fraudulent transfer law is applicable in this adversary proceeding, because the transfer occurred in California, the Property is located in California and both Debtor and Defendant reside in California.

California Civil Code § 3439.04(a) provides:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation incurred, if the debtor made the transfer or incurred the obligation as follows:
 - (1) With actual intent to hinder, delay or defraud any creditor of the debtor.
 - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
 - (A) Was engaged or was about to engage in a business or transactions for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
 - (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal. Civ. Proc. § 3439.04(a).

First Cause of Action

Trustee has alleged in his first cause of action that Debtor had the actual intent to hinder, delay or defraud creditors. Fraud, in the sense of morally culpable conduct, does not need to be present to find an actual fraudulent transfer. Plotkin v. Pomona Valley Imports, Inc., (In re Cohen), 199 B.R. 709, 716 (9th Cir. B.A.P. 1996). The focus is on the state of mind of the debtor. Id. Neither malice nor insolvency are required. Id. at 717. Actual intent may be proven by a preponderance of the evidence. In re Food & Fibre Protection, Ltd., 168 B.R. 408, 418 (Bankr. D. Ariz. 1994) (citing Grogan v. Garner, 498 U.S. 279 (1991)).

1 In order to determine whether a transfer was made with the requisite intent,
2 courts have developed what are known as the “badges of fraud.” Kupetz v. Wolf, 845
3 F.2d 842, 846 (9th Cir. 1988). Case law reflects that actual intent is typically proven
4 from circumstances surrounding the transaction, and a confluence of the “badges of
5 fraud” may constitute an intent to hinder, delay, or defraud creditors, but a finding of
6 badges is not a requirement of a determination of actual fraud. See Food & Fibre, 168
7 B.R. at 418; see also In re Acequia, 34 F.3d 800, 806 (9th Cir. 1994) (“[T]he confluence
8 of several [badges of fraud] can constitute conclusive evidence of actual intent to
9 defraud . . .”).

10 Recently, the California Legislature codified eleven factors, or “badges of fraud,”
11 which may be considered, among others, in determining actual intent. The Legislature
12 specifically stated that “the amendment to this section . . . does not constitute a change
13 in, but is declaratory of, existing law, and is not intended to affect any judicial decisions
14 that have interpreted this chapter.” Cal. Civ. Code § 3439.04(c). These badges are: (1)
15 whether the transfer or obligations was an insider; (2) whether the debtor retained
16 possession or control of the property transferred after the transfer; (3) whether the
17 transfer or obligation was disclosed or concealed; (4) whether before the transfer was
18 made or obligation was incurred, the debtor had been sued or threatened with suit; (5)
19 whether the transfer was of substantially all the debtor's assets; (6) whether the debtor
20 absconded; (7) whether the debtor removed or concealed assets; (8) whether the value
21 of the consideration received by the debtor was reasonably equivalent to the value of
22 the asset transferred or the amount of the obligation incurred; (9) whether the debtor
23 was insolvent or became insolvent shortly after the transfer was made or the obligation
24 was incurred; (10) whether the transfer occurred shortly before or shortly after a
25 substantial debt was incurred; and (11) whether the debtor transferred the essential
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1 assets of the business to a lienholder who transferred the assets to an insider of the
2 debtor. Cal. Civ. Code § 3439.04(b).

3 Here, given the circumstances surrounding the transfer, several of the badges of
4 fraud are present. First, Debtor transferred the Property to an insider, his brother.

5 Next, Debtor transferred the Property, worth at least \$170,000, without receiving
6 any value whatsoever, let alone reasonably equivalent value. The reasonably
7 equivalent value analysis is directed at comparing what the debtor surrendered and
8 what the debtor received. In re Pajaro Dunes Rental Agency, Inc., 174 B.R. 557, 578
9 (Bankr. N.D. Cal. 1994); In re Bateman, 646 F.2d 1220, 1222 (8th Cir. 1981) (gratuitous
10 transfer of valuable property raises presumption of actual fraudulent intent necessary to
11 bar discharge under Section 14(c)(4) of former Bankruptcy Act). In this case, Debtor
12 surrendered Property worth at least \$170,000 and received nothing in return.

13 While Akop and Tigran Boyadzhyan both tried to justify the transfer based on
14 assertions that Akop helped Tigran by paying his bills and lending him money when
15 needed, neither of them could provide any specifics. They were extremely defensive
16 and hostile and acted as though what they did with their finances and property was
17 none of the Trustee's business. The bank statements turned over to the Trustee also
18 conveniently omit the June 2001 statement - the month the property was transferred.

19 Further, Debtor incurred substantial debts shortly after the transfer and knew or
20 should have known he would continue to incur additional debts which he would not be
21 able to pay. Within two years after the transfer, Debtor increased his unsecured debt by
22 over \$125,000 and filed bankruptcy. Specifically, at or about the time of the transfer in
23 June 2001, Debtor had in excess of \$15,000 in credit card debt. Debtor's taxable
24 income for 2001 was \$4,424. Before the transfer, by his own admission, Debtor
25 suffered severe cardiac arrest and related illnesses which rendered him unable to be
26 employed. Given these admitted facts, Debtor had to know that if the Property
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1 remained his, his creditors would be able to seek to collect on their claims against the
2 equity in the Property. By transferring the Property to his brother, knowing he was
3 unable to work, Debtor intended to hinder, delay or defraud creditors.

4 By the time of the bankruptcy filing, again by Debtor's own admission, he had
5 incurred an additional \$125,000 of debt, illustrated by Debtor's Schedule F, which lists
6 claims in excess of \$146,000. If Debtor had not made the transfer, but instead sold the
7 Property for its reasonably equivalent value, Debtor would likely have been able to pay
8 the additional \$125,000 of claims as they came due, and likely would have avoided
9 seeking bankruptcy protection.

10 While Tigran asserted that he believed he would go back to work, he provided no
11 reasonable basis for that belief. While it is understandable that both he and Akop would
12 hope that his health would improve, their actions at the time and the doctor's report
13 make it clear that they were both very concerned about Tigran's future earning
14 capability. Even if Defendant's evidence of a 16 year old debt incurred in Armenia were
15 admissible, there appears to have been no reason to transfer the Property shortly after
16 a lengthy hospitalization for a serious and debilitating illness other than to put it out of
17 reach of Tigran's creditors.

18 Second Cause of Action

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20 Trustee has alleged in his second cause of action a constructive fraud theory -
21 that Debtor received no consideration for the transfer and intended to incur, or believed,
22 or reasonably should have believed that he would incur debts beyond his ability to pay
23 as they became due.

24 The test under California Civil Code § 3439.04(a)(2) measures whether a debtor
25 would reasonably have been able to pay debts as they come due after making the
26 questionable transfer. See Pajaro Dunes, 174 B.R. at 593. Reasonableness is
27 measured through the use of cash flow projections and other forward-looking sources of
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1 evidence. Id. Additionally, it is not necessary for the Chapter 7 Trustee to prove that a
2 particular debt was contemplated; a general intention is enough. Hartnett v. Doyle, 64
3 S.W. 2d 227, 233 (Tenn. App. 1932) (citing 2 Pomeroy's Equity Jurisprudence, § 971
4 (3d ed. 1798)).

5 The facts relevant to the actual fraud analysis also apply to the constructive fraud
6 analyses. For example, Defendant has stipulated that approximately one year prior to
7 the transfer, Debtor suffered from severe cardiac arrest and related illnesses rendering
8 him unable to be employed. Additionally, Defendant has stipulated that at the time of
9 the transfer Debtor was unemployed and prior to the time of the transfer Debtor was
10 also unemployed. Further, Debtor's tax returns for 2001 show an adjusted gross
11 income of only \$4,424. Finally, in addition to the mortgage on his own home, Debtor
12 had significant credit card debt. As such, at the time of the transfer, Debtor did not
13 reasonably believe he would be able to pay his future debts as they came due, when he
14 was unable to work and severely ill. Yet, he knew he would incur ordinary debts that
15 people incur. Given his health condition, he would have known that he might well incur
16 significant medical bills that health insurance might not cover.

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18 At the time of the transfer, Debtor had between \$112,000 and \$182,000 in equity
19 in the Property. In light of the inevitable debts he would later incur and the debts he
20 then had due to his deteriorating health condition and inability to work, the only
21 reasonable course was for Debtor to keep such a valuable asset. By making the
22 transfer, Debtor depleted his assets by approximately \$150,000. That asset could have
23 been used to pay for future debts. A bankruptcy filing could have been avoided.
24 Clearly, Debtor knew or should have known that if he made the transfer, he would have
25 incurred debts that he would be unable to pay as they came due. As such, as
26 contemplated by California Civil Code § 3439.04(a)(2)(B), Debtor made the transfer at a
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CERTIFICATE OF SERVICE BY MAIL

I certify that a true copy of this **MEMORANDUM OF DECISION** was mailed on
NOV 1 2005 to the parties listed below:

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Dated: **NOV 1 2005**

Jewell M. Williams

DEPUTY CLERK