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Court of Appeal, Second District, Division 2,
California.

Joong KIM et al., Plaintiffs and Appellants,
v.

Helen TSAI, Defendant and Respondent.
No. B153952.

(Los Angeles County Super. Ct. No. BC132462).

Feb. 26, 2003.

Creditors brought action against recipient of transfers from debtor for breach of a commercial lease, fraudulent conveyance, and conspiracy. The Superior Court found recipient liable for breach of commercial lease. Recipient appealed. The Court of Appeal reversed. On remand, the Superior Court, Los Angeles County, No. BC132462, Aurelio Munoz, J., granted recipient's motion for summary judgment on creditors' claims for fraudulent conveyance and conspiracy. Creditors appealed. The Court of Appeal, Doi Todd, J., held that: (1) debtor's bankruptcy discharge did not preclude creditors' fraudulent conveyance claim against recipient; (2) genuine issues of material fact precluded summary judgment in creditors' actions for fraudulent conveyance and conspiracy.

Reversed.

West Headnotes

[1] Bankruptcy **3411**

51k3411 Most Cited Cases

Debtor's bankruptcy discharge did not preclude creditors' fraudulent conveyance claim against

recipient of transfers from debtor, where property transferred was pre-bankruptcy property, not after-acquired property, and it was never made a part of the bankruptcy estate. West's Ann.Cal.Civ. Code § 3439.04, 3439.07.

[2] Judgment **181(15.1)**

228k181(15.1) Most Cited Cases

Genuine issues of material fact regarding debtor's intent, whether there was consideration for asset transfers and adequacy of any consideration, and debtor's state of mind with respect to his ability to pay his debts after transfers, precluded summary judgment in creditors' action against recipient of transfers for fraudulent conveyance.

[3] Judgment **181(15.1)**

228k181(15.1) Most Cited Cases

Genuine issues of material fact precluded summary judgment in creditors' action for conspiracy against recipient of allegedly fraudulent conveyances from debtor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Aurelio Munoz, Judge. Reversed.

Gorman & Miller and John C. Gorman for Plaintiffs and Appellants.

Wong & Mak, Fred A. Wong; and Carl W. Greifzu for Defendant and Respondent.

DOI TODD, J.

*1 Plaintiffs Joong Kim and Moon Kim (the Kims) appeal from a summary judgment entered against them and in favor of defendant Helen Tsai (Tsai) in an action to recover monies owed the Kims under a commercial lease based on the alleged fraudulent transfer of real property and business interests to Tsai to avoid creditors' claims. The Kims claim that they are entitled to recover against Tsai in this case pursuant to Sanwa Bank California v. Chang (2001) 87 Cal.App.4th 1314, 105 Cal.Rptr.2d 330, and the trial court erred in refusing to analyze their claims in light of this decision. The Kims further assert that there exist triable issues of material fact as to the sixth cause of action based on alleged fraudulent

conveyances of real property and business interests to Tsai in violation of the Uniform Fraudulent Transfers Act (Civ.Code, [FN1] § 3439 et seq.) (the Act) and the Bulk Sales Act (Cal. U. Com.Code, § 6101 et seq.), and as to the seventh cause of action for conspiracy, thus precluding summary judgment. We agree and reverse.

FN1. All statutory references are to the Civil Code unless otherwise indicated.

PROCEDURAL BACKGROUND

This is the second appeal in this action. A full history of the underlying dispute and procedural background through the first appeal are set forth at length in our unpublished opinion filed February 1, 2001, which we will identify as *Kim I*. [FN2] We will not repeat the facts underlying *Kim I*, but will refer to relevant facts as necessary, and we take judicial notice of the records in the prior appeal. (Evid.Code, § § 459, subd. (a), 452, subd. (d)(1).)

FN2. *Kim et al. v. Tsai*, case No. B136926.

The first appeal followed a trial on severed counts in which the trial court found Tsai individually liable to the Kims for breach of a commercial lease and separate "personal guarantee" signed by the Kims and Charlton Yip (Yip) but not signed by Tsai. We reversed on the grounds that Tsai was not a party to the contracts and the trial court erred in applying theories of estoppel, agency and partnership to hold her individually liable. We remanded for determination of the two remaining causes of action for fraudulent conveyance and conspiracy.

In the sixth cause of action for fraudulent conveyance, the Kims alleged on information and belief that at various times beginning in the fall of 1990 and continuing to the present, Yip transferred his ownership interests in real property, including the residence he shared with Tsai, and in various businesses, including Charlton Yip, Inc., China Way Chinese Fast Food, Inc., and Quong Hoa Supermarket II, Inc., to Tsai without adequate consideration. The Kims further alleged that these conveyances were made with the intent to hinder, delay, or defraud creditors in violation of the Act as well as the California bulk sales laws. In the seventh cause of action for conspiracy, the Kims alleged that defendants had conspired to hinder, delay and defraud the Kims and other creditors in the collection of their claims by making the transfers of property

and business interests alleged in the sixth cause of action.

*2 On remand, Tsai moved for summary judgment on the Kims' claims for fraudulent conveyance and conspiracy. She argued that, as a matter of law, she could not be liable as a *transferor* under a fraudulent conveyance theory in light of our holding in *Kim I* that Tsai has no obligations under the contracts signed only by Yip. Further, she contended she could not be liable as a *transferee* under a fraudulent conveyance theory because the Kims' claims against Yip were discharged by Yip's Chapter 7 bankruptcy. As a result, Tsai maintained, Yip cannot be deemed a "debtor" under the Act, and any transfer of property by Yip to Tsai therefore "cannot rise to the level of a fraudulent conveyance." Tsai did not address the Kims' conspiracy claim except to assert that without an underlying tort or wrongful conduct, no liability for civil conspiracy exists.

Tsai's separate statement in support of the motion for summary judgment averred that (1) Yip filed for Chapter 7 bankruptcy on May 24, 1996; (2) notice of the bankruptcy was given on August 2, 1996; (3) on September 11, 1996 the bankruptcy court issued an order of discharge, which discharged "the debts listed by Yip, including obligations arising from this action"; (4) the Kims filed an amended complaint on August 13, 1996; (5) the judgment against Tsai was reversed by this court (*Kim I*); and (6) *Kim I* held that Tsai had no obligations under either the subject lease or the guarantee, and on remand the trial court was ordered to enter judgment in favor of Tsai "as to those causes of action." Tsai's evidence in support of the motion consisted of various documents from the bankruptcy proceedings establishing that Yip had indeed been discharged from bankruptcy, and Tsai had prevailed on appeal in *Kim I*.

In opposition to the motion for summary judgment, the Kims relied on *Sanwa Bank California v. Chang, supra*, 87 Cal.App.4th 1314, 105 Cal.Rptr.2d 330 (*Sanwa*), to assert that Yip's bankruptcy discharge did not preclude an action for fraudulent conveyance against Tsai as a transferee of property from Yip prior to his bankruptcy discharge under the Act. In addition, the Kims contended that Tsai had committed wrongful acts sufficient to establish liability for conspiracy, thus precluding summary judgment on that claim as well.

The trial court granted Tsai's motion for summary

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judgment. The court determined that *Sanwa* did not apply because the *Sanwa* court had found the nondebtor spouse liable for the community debt irrespective of the fraudulent transfer, "[a fact] that is not present here." The court further held that the case relied upon by the Kims for their conspiracy cause of action, *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 35 Cal.Rptr. 652, had been overruled by the California Supreme Court in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454, and since there existed no liability for fraudulent conveyance, there was no underlying tort, and hence no conspiracy liability. The trial court awarded costs to Tsai upon submission of a memorandum of costs.

*3 The Kims sought reconsideration of the trial court's order, which the court denied. Tsai submitted a memorandum of costs for \$8,118, and the Kims moved to tax costs. On October 17, 2001, prior to the hearing on Tsai's motion for attorney fees and the Kims' motion to tax costs, the Kims filed their notice of appeal from the summary judgment. [FN3]

FN3. Although the Kims purported to appeal "any award of attorneys' fees and costs," there was no briefing on the subject, and we cannot determine from the record before us what orders the trial court made in this regard. Accordingly, in addition to being rendered moot by our determination of this appeal, we deem the Kims' appeal on this issue abandoned.

DISCUSSION

1. Standard Of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612, 76 Cal.Rptr.2d 479, 957 P.2d 1313.) Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

"On appeal, this court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law." (*O'Byrne v. Santa Monica UCLA Medical Center* (2001) 94 Cal.App.4th 797, 805, 114 Cal.Rptr.2d 575.)

2. *Yip's bankruptcy discharge does not preclude a claim against Tsai as the recipient of fraudulently conveyed property from Yip.*

[1] Tsai contends that the Kims are barred as a matter of law from maintaining a claim against her for fraudulent conveyance because this court has already determined she has no liability to the Yips in contract, and the Kims' only recourse for satisfaction of Yip's debt was in the bankruptcy proceedings. *Sanwa*, she argues, is distinguishable because in that case the nondebtor spouse was held to be liable on the community debt regardless of any fraudulent transfer between the spouses. The Kims counter that under the Act, Yip's bankruptcy discharge bars the Kims from pursuing a claim only against Yip, and does not preclude their claim for fraudulent conveyance against Tsai. They assert that Yip's bankruptcy discharge did not extinguish the Kims' claims against Tsai as the recipient of fraudulently conveyed assets, and the trial court's summary adjudication of this claim in Tsai's favor was based on a misinterpretation of the *Sanwa* case. We agree, and find *Sanwa* to be directly applicable to this case.

Under section 3439.04 of the Act, "[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 was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (a) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: [¶] (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or [¶] (2) 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." (§ 3439.04; *Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 122, 10 Cal.Rptr.2d 55.)

*4 Pursuant to section 3439.07 a creditor who is

damaged by a fraudulent transfer described under section 3439.04 may set aside the transfer or seek other appropriate relief to the extent necessary to satisfy the creditor's claim. And "a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim" in order to pursue the remedy provided under section 3439.07, subdivision (a). (Legis. Com. com.--Assembly, 1986 addition, West's Ann. Civ.Code § 3439.07 (1997 ed.) p. 341.) To the extent a transfer is voidable under section 3439.07, a judgment for the value of the asset transferred or in the amount necessary to satisfy the creditor's claim, whichever is less, may be entered against "[t]he first transferee of the asset or the person for whose benefit the transfer was made." (§ 3439.08.)

In *Sanwa*, Sanwa Bank California (the bank) filed a fraudulent conveyance action against a bankruptcy debtor's wife arising out of the bank's loan to the debtor. The debtor had not listed the family residence as an asset of the bankruptcy, characterizing it as separate property which he had conveyed to his wife without consideration within 12 months of filing his bankruptcy petition.

On appeal from a judgment in favor of the bank, the wife contended, as Tsai does here, "that the fraudulent conveyance should have been brought to the attention of the bankruptcy court, and [the bank], having failed to do so and having permitted [the debtor] to be discharged from bankruptcy without raising the issue, now has no further recourse under state law." (*Sanwa, supra*, 87 Cal.App.4th at pp. 1317-1318, 105 Cal.Rptr.2d 330.) The *Sanwa* court disagreed, holding: "The injunction created by [debtor's] discharge does not protect the residence from the present fraudulent conveyance action because it was pre-bankruptcy property, not after-acquired property, and it was never made a part of the bankruptcy estate." (*Id.* at p. 1319, 105 Cal.Rptr.2d 330.)

So it is here. Although Yip apparently listed his obligations to the Kims in the bankruptcy estate, there is no indication that he listed any of the property or business interests he allegedly conveyed to Tsai in the bankruptcy estate. Yip's bankruptcy discharge thus had no effect on the present action. As one court explains, once the debtor is discharged, the creditor's only recourse for fraudulent conveyances made prior to the bankruptcy proceedings is in a separate action against the transferee. While the

bankruptcy trustee could have pursued a fraudulent conveyance action under 11 United States Code section 548 while the bankruptcy case was still pending, once it had closed, "the trustee was divested of any interest in, and of title to, any claim the estate may have had for fraudulent conveyance. In these circumstances, any protection from the automatic stay from prepetition claims against the debtor or its property is terminated once property is no longer property of the bankruptcy estate and the case is closed. Title 11 United States Code section 362(c) provides in pertinent part: [¶] (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and [¶] (2) the stay of any other act under subsection (a) of this section continues until the earliest of--[¶] (A) the time the case is closed...." (*Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1843, 35 Cal.Rptr.2d 348.) The court continued, "[t]hus, by abandoning any potential assets of the debtor and the closing of the bankruptcy case, appellant is not precluded by the automatic stay from pursuing an action against persons who are nondebtors and against property which, if it ever was scheduled as property of the estate, is no longer property of the estate. (See, e.g., *In re Torrez* (Bankr.E.D.Cal.1991) 132 Bankr.924 [no violation against automatic stay provision to foreclose on property not listed as an asset on bankruptcy schedules and held by non-debtors].)" (*Ibid.*)

*5 Tsai contends that the property and business interests Yip transferred to her were properly excluded from the bankruptcy estate because Yip and Tsai had no community property (since they were never actually married), and the pre-bankruptcy transfer to Tsai therefore consisted only of Yip's separate property. Accordingly, *Sanwa*, which held that the wife remained personally liable for the community debt, is distinguishable, because "Tsai has absolutely no contractual liability to the Kims-either directly or indirectly through community property liability." We disagree.

The *Sanwa* decision was not based on the fact that community property was involved. To the contrary, the court's determination rested on its conclusion that a bankruptcy discharge protects *after-acquired* community property from a creditor holding a community claim. *Sanwa* also held that a discharge in bankruptcy does not insulate the recipient of fraudulently transferred property that was never

included in the bankruptcy estate from creditors' claims under the Act. (*Sanwa, supra*, 87 Cal.App.4th at p. 1319, 105 Cal.Rptr.2d 330.) Accordingly, the nondebtor spouse in *Sanwa* was liable to the bank under the Act as a transferee of fraudulently conveyed assets.

3. *Triable issues of material fact exist with respect to the Kims' causes of action for fraudulent conveyance and conspiracy.*

[2] In order to prevail on their claim for fraudulent conveyance against Tsai, the Kims must establish that Yip transferred assets to Tsai, "(1) with an actual intent to hinder, delay or defraud any creditor, [and] (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he ... would incur debts beyond his ... ability to pay as they became due." (*Monastra v. Konica Business Machines, U.S.A., Inc.* (1996) 43 Cal.App.4th 1628, 1635, 51 Cal.Rptr.2d 528.) Questions concerning Yip's intent, whether there was consideration for the asset transfers and the adequacy of any consideration, and Yip's state of mind with respect to his ability to pay his debts after the transfers are all issues of fact which remain in dispute. The presence of these issues of fact plainly precludes summary adjudication of the fraudulent conveyance claim. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1294, 123 Cal.Rptr.2d 924.)

Apparently relying on the defense afforded by section 3439.08 [FN4] to a fraudulent conveyance action under section 3439.04, subdivision (a), Tsai contends that as the innocent recipient of fraudulently transferred property she is entitled to summary adjudication of the fraudulent conveyance claim. But the questions whether Tsai took the assets from Yip "in good faith" and for a "reasonably equivalent value" are by no means settled in this case. And Tsai's mere allegation of innocence does not establish a basis for summary adjudication.

FN4. Section 3439.08, subdivision (a) provides: "A transfer or an obligation is not voidable under subdivision (a) of section 3439.04, against a person who took in good faith and for a reasonably equivalent value...."

*6 [3] Questions of fact also remain unresolved as to the Kims' cause of action for conspiracy. " ' "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design.... In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity." ' " (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at p. 511, 28 Cal.Rptr.2d 475, 869 P.2d 454.)

The bottom line is that nothing in Tsai's motion for summary judgment addresses any of the elements of the Kims' claims for fraudulent conveyance or conspiracy, much less establishes the absence of a material question of fact to mandate judgment in Tsai's favor. Tsai thus failed to carry her burden, and the trial court's ruling granting summary judgment in her favor was error.

4. *Tsai did not establish any basis for summary adjudication of the Kims' conspiracy claim.*

Since the Kims' cause of action for the tort underlying the conspiracy claim remains viable, and material issues of fact exist with respect to the Kims' conspiracy claim, the trial court erred in granting summary adjudication of this cause of action. Tsai nevertheless maintains that she is entitled to summary adjudication of the conspiracy claim because the case relied on by the Kims, *Wise v. Southern Pacific Co., supra*, 223 Cal.App.2d 50, 35 Cal.Rptr. 652, was overruled by the California Supreme Court in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th 503, 28 Cal.Rptr.2d 475, 869 P.2d 454. But the Kims' reliance on the *Wise* case was limited to its summary of the elements of a conspiracy claim, which was echoed by the Supreme Court in the *Applied Equipment* case. Nothing in *Applied Equipment* contravenes the general principles discussed in *Wise* concerning the civil conspiracy doctrine.

DISPOSITION

The judgment in favor of respondent is reversed. Respondent is ordered to bear appellants' costs of appeal.

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We concur: BOREN, P.J., and ASHMANN-GERST,
J.

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