FILED
United States Court of Appeals
Tenth Circuit

September 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DIANN MARIE CATES,

Debtor.

JARED COLE WALTERS, Trustee,

Plaintiff - Appellant,

v.

L. EDMOND CATES; JANN REDELE CATES,

Defendants - Appellees,

THE COLORADO BAR ASSOCIATION; THE LAND TITLE ASSOCIATION,

Amicus-Curiae.

No. 18-1355
(BAP No. 17-47-CO)
(Bankruptcy Appellate Panel)

ORDER AND JUDGMENT[*]

Before **HOLMES**, **BRISCOE,** and **EID**, Circuit Judges.

Appellant Jared Walters, the trustee of Diann Marie Cates' Chapter 7 bankruptcy estate, seeks to avoid a real property transfer from the debtor to Appellees

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

L. Edmond and Jann Redele Cates pursuant to 11 U.S.C. § 547(b). To do so, the trustee must demonstrate, among other requirements, that this transfer occurred within the 90-day pre-petition window provided by § 547(b)(4). When this real property transfer occurred for purposes of this provision, in turn, depends on when the transfer was "perfected," as defined by § 547(e).

On summary judgment, the bankruptcy court concluded that the transfer was perfected and made on March 4, 2013—long before Ms. Cates filed her bankruptcy petition on August 11, 2015—and thus was not avoidable under § 547(b). The Bankruptcy Appellate Panel affirmed, and the trustee now appeals to this court. We have jurisdiction pursuant to 28 U.S.C. § 158(d)(1).

We find that the trustee has met the requirement under § 547(b)(4), and therefore reverse the judgment of the bankruptcy court and remand for further proceedings consistent with this order and judgment.

I. FACTUAL BACKGROUND

The following facts are undisputed. In 2012, the debtor in this Chapter 7 bankruptcy case, Diann Marie Cates, executed a $135,000 promissory note payable to Appellees L. Edmond and Jann Redele Cates. The note was secured by real property owned by the debtor in Durango, Colorado, as evidenced by a deed of trust. While the deed bears the same date as the note, August 1, 2012, the debtor appears to have executed the deed on October 12, 2012. Several months later, on March 4, 2013, Appellees recorded the deed of trust in La Plata County, Colorado.

Between the time the promissory note and deed of trust were executed and the time the deed of trust was recorded, however, the debtor created the Diann M. Cates Family Trust and conveyed her interest in the Durango property by a quitclaim deed to this entity. The trust, which the debtor created on January 24, 2013, is a self-settled revocable trust. And, although not listed as such in the formation documents, the parties do not dispute that the debtor is a beneficiary of the trust. Indeed, the formation documents do make clear that the debtor's interests are to "be considered primary and superior to the interests of any beneficiary." Aplt. App'x. at 22, 112–16, 150. The trust recorded the quitclaim deed in La Plata County on February 3, 2013—the same day the debtor conveyed her interest to the trust.

On August 3, 2015, just eight days before the debtor filed for Chapter 7 bankruptcy, the trust re-conveyed the property back to the debtor, again by a quitclaim deed. The debtor recorded this new quitclaim deed that same day. At the time of her bankruptcy petition, the property was valued at $187,000, and the debtor indicated that she still owed the full value of the promissory note to the Appellees.

Appellant Jared Walters, the trustee of the debtor's Chapter 7 estate, initiated an adversary proceeding to avoid the 2012 deed of trust transfer to the Appellees pursuant to § 547(b). Based on the foregoing undisputed facts, both parties moved for summary judgment. The bankruptcy court ordered supplemental briefing, and eventually entered summary judgment in favor of the Appellees. Relying on *Pandy v. Independent Bank*, 372 P.3d 1047 (Colo. 2016), the bankruptcy court held that "the debtor retained an ownership interest in the property held by the revocable trust and

the debtor's ownership interest was subject to the [Appellees'] deed of trust when [it was] recorded on March 4, 2013." Aplt. App'x. at 161. Therefore, according to the bankruptcy court, "[u]nder the operations of § 547(e)(2)(B) and (e)(3), because the debtor had an ownership interest in the property on the date the deed of trust was recorded, the transfer took place on that date." *Id.* (simplified). The bankruptcy court thus concluded as a matter of law that the deed of trust transfer was not avoidable under § 547(b) because the transfer "took place outside the § 547(b)(4) preference period." *Id.*

The trustee appealed to the Bankruptcy Appellate Panel (BAP). The BAP affirmed but based its holding on different grounds. According to the BAP, whether the debtor retained an interest in the property when the Appellees recorded the deed of trust was immaterial to resolving this case. Instead, the BAP grounded its conclusion in its application of § 547(e)(2) and (e)(1), not (e)(3). The BAP thus looked to Colorado law to determine when the deed of trust transfer was perfected to ascertain the statutorily determined date of transfer. The BAP first found that the deed of trust was outside of the chain of title when it was recorded. Nonetheless, the BAP next found that a bona fide purchaser from the debtor on that date would have still been on constructive notice of the Appellees' interest because the quitclaim deed from the debtor to the trust would have prompted further inquiry that would have revealed the deed of trust. As a result, the BAP held that "no bona fide purchaser from the debtor could obtain superior title to the lien created by the deed of trust after March 4, 2013" and that the transfer thus was perfected and occurred for purposes of

the preference statute on that date. Aplt. App. at 180. "Since March 4, 2013 is well outside either preference period specified in § 547(b)(4)," the BAP concluded that "the transfer of an interest in the Property by recordation of the Deed of Trust does not constitute an avoidable preferential transfer under § 547(b)." *Id.*

The trustee now appeals to this court.[1]

II. ANALYSIS

Generally, when we review a bankruptcy court decision on appeal, our standard of review is de novo for legal questions and clear error as to the bankruptcy court's factual findings. *Melnor, Inc. v. Corey*, 583 F.3d 1249, 1251 (10th Cir. 2009). "Although the BAP is a subordinate appellate court not entitled to deference, its rulings are often persuasive." *In re C.W. Mining Co.*, 625 F.3d 1240, 1244 (10th Cir. 2010) (citing *Mathai v. Warren*, 512 F.3d 1241, 1248 (10th Cir. 2008)). Here, we consider a pure legal question, and so we proceed to evaluate the bankruptcy court's decision de novo.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *see also* Fed. R. Bank. P. 7056.

To avoid a transfer pursuant to § 547(b), a bankruptcy trustee must show that, among other things, the transfer was made "on or within 90 days before the date of the filing of the petition" or, "if such creditor at the time of such transfer was an

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[1] The Land Title Association of Colorado and the Real Estate Section of the Colorado Bar Association have filed briefs in this appeal as *amici.*

insider," "between ninety days and one year before the date of the filing of the petition." 11 U.S.C. § 547(b)(4). The timing of when such a transfer is "made" is defined in § 547(e) and depends on whether and when the transfer was "perfected." § 547(e)(1)–(2).[2] Under this scheme, a "transfer is made":

> (A) "at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time";
>
> (B) "at the time such transfer is perfected, if such transfer is perfected after such 30 days"; or
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> (C) "immediately before the date of the filing of the petition, if such transfer is not perfected at the later of" "the commencement of the case" or "30 days after such transfer takes effect between the transferor and the transferee."

§ 547(e)(2).

For a transfer of real property such as the transfer at issue here, the transfer "is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee." § 547(e)(1). This inquiry turns on the application of the state law where the property is located, which for our purposes is

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[2] "'What constitutes a transfer and when it is complete' is a matter of federal law." *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (quoting *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369–70 (1945)). A "transfer" under the Bankruptcy Code includes (A) "the creation of a lien," (B) "the retention of title as a security interest," (C) "the foreclosure of a debtor's equity of redemption," and (D) "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" "property" or "an interest in property." 11 U.S.C. § 101(54).

Colorado law.[3] *See In re Hedrick*, 524 F.3d 1175, 1181 (11th Cir. 2008); *see also Corn Exch. Nat'l Trust Co. v. Klauder*, 318 U.S. 434, 436–37 (1943). Despite the perfection analysis, "a transfer is not made until the debtor has acquired rights in the property transferred." 11 U.S.C. § 547(e)(3); *see Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) ("'What constitutes a transfer and when it is complete' is a matter of federal law.") (quoting *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369–70 (1945)).

Following the courts below, the Appellees argue that the transfer of the deed of trust was perfected on March 4, 2013—the date they recorded the deed. First, and relying on the BAP's analysis, the Appellees argue that a bona fide purchaser would be on constructive notice of the deed of trust. Like the BAP, the Appellees argue that once the deed of trust was recorded, a bona fide purchaser from the debtor would have been on notice of the Appellees' interest because the quitclaim deed from the debtor to the trust would have tipped off further inquiry that would have disclosed the deed's existence. As a result, Appellees argue, a bona fide purchaser from the debtor

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[3] Although the trust documents state that they should be construed in accordance with Arizona law, Colorado law applies to this action. Indeed, the parties do not seem to dispute this fact on appeal. It is undisputed that the property is located in Colorado. Consequently, pursuant to Colorado's choice of law rules, which follow the Second Restatement's approach, Colorado has much stronger ties to the merits of the case than Arizona and the public policy implications for Colorado are significant. *See Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 (Colo. 1979). The Arizona trust document's choice of law provision, moreover, only applies to the parties to the trust. Because the Appellees were not parties to the trust or included in its formation documents, the choice of law provision does not even appear to apply to them. Furthermore, the trust itself is not implicated here since it was no longer record-owner of the property at the time of the bankruptcy petition.

could not acquire an interest superior to their lien. This argument, however, misapplies Colorado law.

Colorado has a race-notice statute, *see* C.R.S. § 38-35-109, and utilizes a grantor-grantee indexing system. § 30-10-408; *Collins v. Scott*, 943 P.2d 20, 22 (Colo. App. 1996). In addition, Colorado follows "the chain of title doctrine." *See id.* at 23. Accordingly, Colorado requires that "[e]ach owner . . . be examined in the grantor index from the date such owner actually acquired the title interest being searched through the date of recordation of the transaction which transferred the interest from the owner." *Id.* (quoting 11 Thompson on Real Property § 92.07(d) (D. Thomas ed. 1994)). But "[t]ransactions indexed before or after these time boundaries may be considered to be recorded outside of the chain of title" and "recordation outside of the chain of title is equivalent to not being recorded at all." *Id.* (quoting *Thompson on Real Property*, *supra*, § 92.07). "As a result, a searcher is not charged with notice of any documents outside the chain of title." *Id.* (quoting *Thompson on Real Property*, *supra*, § 92.07). When the deed was recorded and up until at least the trust conveyed the Durango property back to the debtor,[4] the deed of trust was outside of the chain of title. The Appellees recorded their deed after the trust

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[4] While it may also be true that the deed of trust was also outside of the chain of title after the debtor recorded the second quitclaim deed, as the *amici* in this case argue, we decline to address that question. The trustee explicitly conceded that, at the point the second quitclaim deed was recorded, the deed of trust was "perfected" for purposes of the preference provisions both below and in his opening brief to this court. Accordingly, we deem this argument waived. *See, e.g.*, *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1112 n.5 (10th Cir. 2017).

recorded the February 3, 2013 quitclaim deed and, as a result, the Appellees' recordation was outside the time bounds within which Colorado law would require a purchaser to search. Thus, a bona fide purchaser would not be charged with notice of the Appellees' interest.

Of course, although a document lies outside the chain of title, a purchaser may still be charged with notice under Colorado law if "a possible irregularity appears in the record which indicates the existence of some outside interest by which the title may be affected." *Collins*, 943 P.2d at 22. "In such cases, a purchaser is bound to investigate and is charged with knowledge of the facts to which the investigation would have led." *Id.* But a quitclaim deed in and of itself is not an irregularity that prompts further inquiry under Colorado law. *See Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 n.12 (Colo. 2003) ("There was a time when the use of a quitclaim deed may have triggered a duty of inquiry; however, that presumption is no longer favored.") (citations omitted). We accordingly reject the Appellees' first argument that the deed of trust was perfected on March 4, 2013 because a bona fide purchaser would have been on notice of the deed of trust.

The Appellees next rely on the Colorado Supreme Court's decision in *Pandy* to argue that the deed of trust was perfected on March 4, 2013. Like the bankruptcy court, the Appellees make the following argument:

> Under the ruling by the Colorado Supreme Court in *Pandy v. Independent Bank*, 372 P.3d 1047 (Colo. 2016), the debtor retained ownership in the property notwithstanding the transfer of legal title to her self-settled revocable trust, therefore the security interest was

> perfected and the date of the transfer of the interest occurred when the deed of trust was recorded on March 4, 2013.

Aple. Br. at 4. This line of reasoning, however, is incomplete under the § 547(e) scheme. Although *Pandy* held that a co-settlor of a revocable trust retained an ownership interest in the trust's assets, it did not alter Colorado's priority scheme in doing so. *See Pandy*, 372 P.3d at 1049–50. In fact, the Appellees concede this point. *See* Aple. Br. at 8 ("*Pandy* does not address an issue of lien perfection in order to determine the priority of competing property interests."). The Appellees, as well as the bankruptcy court, thus seem to be arguing that because the debtor retained an interest in the property on March 4, 2013, the deed of trust was "perfected" when it was recorded on that day. But such an argument ignores § 547(e)(1) and, in turn, any application of Colorado law that would establish priority here. In addition, § 547(e)(3) only instructs that "[a] transfer is not made until the debtor has acquired rights in the property transferred." While this provision may thus alter the statutorily determined timing of the transfer if the transferee "perfects" her interest before the debtor acquired rights to the property transferred, *see, e.g.*, *In re Matter of Jackson*, 850 F.3d 816, 820–21 (5th Cir. 2017), that provision does not alter the perfection inquiry in § 547(e)(1) needed to inform the timing of the transfer under § 547(e)(2). We therefore also reject this argument and reverse the bankruptcy court.[5]

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[5] Like the BAP, we also do not think that this case turns on § 547(e)(3)'s mandate that "[a] transfer is not made until the debtor has acquired rights in the property transferred." There is no dispute that the debtor was the record owner of the property when the debtor transferred the deed of trust to the Appellees. Therefore, § 547(e)(3) is satisfied, and the transfer was "made." The question still remains, however, how

To be sure, the Appellees also rely on *Pandy* to argue that "any title search involving property held by a revocable trust would require a search under the name of the settlor during the time of ownership by the Trust to determine if any judgment creditors of the settlor had recorded judgment liens." Aple. Br. at 7. Hence, the Appellees further argue that "that search would also disclose any other interests including [the] deed of trust granted by the settlor." *Id*. Sensibly read, however, *Pandy* is a collection case, not a recording act case, and creates no such search requirement. Indeed, *Pandy* makes no mention of Colorado's recording system, never cites to or references C.R.S. § 38-35-109, and does not even discuss constructive notice, record title interests in real property, or priority of interests. Furthermore, the discussion in *Pandy* turns on a creditor's right, not a bona fide purchaser's. Therefore, we distinguish *Pandy* and reject the Appellees' argument.

Left with a deed of trust outside the chain of title and no reason under Colorado law to conclude that a bona fide purchaser would have been on notice of that deed or would otherwise have been unable to obtain an interest from the debtor superior to that of the Appellees' lien, we conclude that the deed of trust was unperfected between the time it was recorded and the time the debtor recorded the second quitclaim deed on August 3, 2015. Although the trustee concedes that the transfer of the deed of trust was perfected on—and hence considered by the

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the Bankruptcy Code determines the time of transfer for purposes of § 547(b). As outlined above, that question requires the court to look to § 547(e)(1) and (e)(2), as well as state law.

preference provisions to have occurred on—August 3, 2015, *see supra* n.3, that date is within the preference period.[6] We therefore find that the trustee has met the § 547(b)(4) requirement, and reverse the bankruptcy court's decision, which found otherwise.

III. CONCLUSION

The parties also ask us to resolve on appeal the other four requirements the trustee must satisfy to avoid the deed of trust transfer under § 547(b). Because the bankruptcy court limited its discussion to § 547(b)(4), we decline to pass upon the other § 547(b) requirements in the first instance. Accordingly, we remand for further proceedings consistent with this order.[7]

Entered for the Court

Allison H. Eid
Circuit Judge

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[6] Because August 3, 2015, is just eight days before the petition date, this is true regardless of whether the Appellees are "insiders."

[7] Because we find the application of Colorado's recording scheme clear in this case—and because we reject the Appellees' reading of *Pandy* that would alter this scheme—we also deny the trustee's motion to certify.