Goldsmith v. Zazzali

United States District Court for the District of Idaho

July 2, 2019, Decided; July 2, 2019, Filed

No. 1:19-cv-2 WBS

Reporter
2019 U.S. Dist. LEXIS 118490 *

MARTY GOLDSMITH, Defendant-Appellant, v. JAMES R. ZAZZALI, as Trustee for the Debtors' Jointly-Administered Chapter 11 Estates and/or as Litigation Trustee for the DBSI Estate Litigation Trust, Plaintiff-Appellee.

Prior History: [*1] Bankr. Adv. Case No. 12-06056-TLM.

Zazzali v. Goldsmith (In re DBSI, Inc.), 2018 Bankr. LEXIS 3652 (Bankr. D. Idaho, Nov. 21, 2018)

Counsel: For Marty Goldsmith; Appellant: Brian F McColl, LEAD ATTORNEY, WILSON & MCCOLL, Boise, ID USA; Kimbell D Gourley, LEAD ATTORNEY, JONES WILLIAMS FUHRMAN & GOURLEY, P.A., Boise, ID USA.

For, James R. Zazzali, as Trustee for the Debtors' Jointly-Administered Chapter 11 Estates and/or as Litigation Trustee for the DBSI Estate Litigation Trust, Appellee: Brett S Theisen, LEAD ATTORNEY, PRO HAC VICE, Gibbons, PC, Newark, NJ USA; Guy V. Amoresano, LEAD ATTORNEY, PRO HAC VICE, Gibbons P.C., Newark, NJ USA; Keely E. Duke, LEAD ATTORNEY, Duke Scanlan & Hall, PLLC, Boise, ID USA; Kevin Alan Griffiths, LEAD ATTORNEY, Duke Scanlan & Hall, PLLC, Boise, ID USA; Mark B. Conlan, LEAD ATTORNEY, Gibbons P.C., Newark, NJ USA.

Judges: WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM B. SHUBB

Opinion

MEMORANDUM AND ORDER RE: BANKRUPTCY APPEAL

Defendant-Appellant Marty Goldsmith ("Goldsmith" or "appellant") appeals from a judgment of the bankruptcy court in favor of the trustee for debtor DBSI, Inc. ("DBSI"). The issue on this appeal is whether the bankruptcy court erred in holding that *§§ 548* and *550 of the Bankruptcy Code* permitted the trustee to recover $2,900,258.54 paid by DBSI-related entities to Goldsmith in connection **[*2]** with Goldsmith's sale of a 177-acre partially developed residential subdivision in Ada County, Idaho (the "Tanana Valley Property," or the "Property").

I. Proceedings Below

As found by the bankruptcy court, DBSI and its related entities were involved in three main business activities: (1) the sale to investors of tenant in common real estate interests, (2) the purchase of real estate, and (3) investments in technology companies. DBSI and its related entities were run as a unified enterprise under common ownership and control, led by Doug Swenson ("Swenson") and others, with a small group of insiders who raised cash, comingled it, and distributed it as necessary. (ER 76-77.)

Beginning in 2005, DBSI and its entities were engaged in a massive Ponzi scheme, under which promissory notes, bonds, and tenant in common ("TIC") interests were created and sold to new investors. Tenant in common sales constituted the largest of these three methods. Under all three, though, the proceeds were used to repay or redeem earlier investors at the unsupported rates of return that had been promised.[1] (ER 76-77.) Swenson and others were eventually convicted for wire fraud and/or securities fraud in connection **[*3]** with DBSI's Ponzi scheme, and their convictions were affirmed by the Ninth Circuit. *United States v. Ellison, 704 F. App'x 616 (9th Cir. 2017)*. The trustee in DBSI's bankruptcy proceedings eventually filed suit against Goldsmith to "avoid," or invalidate, certain payments made by DBSI-related entities to Goldsmith in connection with their purchase of the Property.[2]

The purchase of the Property proceeded through multiple steps over several months. On April 17, 2006, appellant Goldsmith entered into a purchase and sale agreement ("PSA") with Kastera, LLC ("Kastera"), an entity 67% owned by Swenson and 33% owned by Thomas Var Reeve ("Reeve").[3] Under the PSA, appellant contracted to sell the Property to Kastera for $35,804,500, with $3,4000,000 in earnest money to be paid in the form of a note from Kastera, due September 10, 2006, guaranteed by Swenson and Reeve. The remaining balance, $32,404,500, would be paid at closing, scheduled in October 2006. (ER 79, 95.)

The parties later agreed to extend the maturity date of the earnest money note to October 10, 2006, after Kastera paid $500,000 to Goldsmith as an "extension payment." Kastera then paid the remainder of the amount due for earnest money on the due date, including accrued interest, or $2,980,258.54, **[*4]** using funds that came from other DBSI entities. After various negotiations, including negotiations regarding a new total purchase price and amount due at closing, the parties agreed that $25,400,000 would be due at a new closing date of February 26, 2007. That new amount was paid at closing, resulting in a total amount paid, excluding the $500,000 extension payment, of $28,380,258.54.[4] (ER 22-26, 79-81, 95-104.)

The bankruptcy court found, however, that the value of the Property at closing was in fact only $25,480,000,[5] which is $2,900,258.54 less than the total amount paid to Goldsmith, excluding the extension payment. (ER 81, 141.) The bankruptcy court also found, inter alia, that Goldsmith acted in good faith and without knowledge of DBSI's Ponzi scheme, and thus was liable only for the amount of funds he received in excess of the value of the Property, under *11 U.S.C. §§ 548(c)* and *550(b)(1)*. (ER 133-35, 141.) Having made these findings, the bankruptcy court entered judgment in favor of the trustee for $2,900,258.54.

II. Legal Standard

---

[1] As found by the bankruptcy court, DBSI's tenant in common "syndication" business proceeded as follows: (1) DBSI would acquire real property; (2) DBSI would solicit investors to purchase fractional interests in that property; (3) a DBSI entity would lease the property from the investors and then sublease the property to commercial tenants, who would pay rent; and (4) investors were guaranteed a certain rate of return. (ER 82-83.) However, the cash received from rents was not segregated but was commingled among various DBSI entities, and payments to current investors were dependent on DBSI obtaining new tenant in common properties and soliciting new investors. (ER 84-89, 94 n.39.)

[2] The bankruptcy court held a two-stage trial in 2017 and 2018, at which hundreds of exhibits were admitted and 22 witnesses testified. (ER 75 n.4, 78, 81.) After trial, the bankruptcy court issued a comprehensive 61-page opinion setting forth its findings of fact and conclusions of law. (See ER 75 (citing *Fed. R. Bankr. P. 7052*.)

[3] Kastera obtained from DBSI entities the funds it used to buy real estate properties, and Swenson "personally exercised significant control over Kastera and its decisions." (ER 96-97.) Multiple witnesses also testified that Kastera could not have self-financed the Tanana Valley Property and that the funds for that purchase would have to come and did come from DBSI. (ER 97-104.)

[4] The bankruptcy court appears to have excluded the $500,000 extension payment from its calculation of the total amount paid to Goldsmith because the trustee clarified earlier in the case that he was not seeking to avoid that $500,000 payment. (See ER 103 n.63.)

[5] Neither party contests this valuation on appeal.

In reviewing the bankruptcy court's decision, legal conclusions are reviewed de novo while factual findings are reviewed for clear error. *Allred v. Kennerley (In re Kennerley), 995 F.2d 145, 146 (9th Cir. 1993)*. Findings of fact are not clearly erroneous **[*5]** "unless the court is left with the definite and firm conviction that a mistake has been committed." *Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109 (9th Cir. 2010)* (citation and internal punctuation omitted). Mixed questions of law and fact are reviewed de novo. Id.

III. Discussion

Under *§§ 548* and *550 of the Bankruptcy Code*, trustees for debtors may be able to avoid fraudulent transfers of money or property from the debtor to third party transferees, making the property a part of the bankruptcy estate. However, third parties can assert certain defenses under *§§ 548* and *550* that may bar or limit recovery by the trustee for those transfers. At issue here is whether appellant is entitled to any of these defenses, and whether the trustee proved that the transfers were fraudulent.

A. Ponzi Presumption

Appellant Goldsmith's first argument on appeal is that the bankruptcy court erroneously determined that the transfers to him were in furtherance of DBSI's Ponzi scheme. Because of this alleged error, appellant argues that the bankruptcy court also erroneously determined that the debtor, DBSI, had the requisite fraudulent intent required to avoid the transfers to Goldsmith.

While *§§ 548(a)(1)(A)* and *544(b)* allow trustees to avoid certain transfers by the debtor, the trustee must show that at the time of transfer, the **[*6]** transferor was acting with fraudulent intent to hinder or delay its general creditors. This may be shown through evidence of the transferor's fraudulent intent, or through application of the "Ponzi presumption." Under the Ponzi presumption, any transaction made in the course of a Ponzi scheme is presumed to have been made with fraudulent intent. See, e.g., *Barclay v. Mackenzie (In re AFI Holding, Inc.), 525 F.3d 700, 704 (9th 2008)*. However, some courts, including the bankruptcy court in this case, have required that in order for the Ponzi presumption to apply, the transfer must have been made by the transferor "in furtherance" of the Ponzi scheme.[6] (See ER 115-20.)

Appellant concedes that DBSI was engaged in a Ponzi scheme, but argues that there is no evidence that the payment of the earnest money and final payment for the Property were made in furtherance of the Ponzi scheme. In his view, there is no evidence that the purchase of the Property was connected to the Ponzi scheme, because not all of DBSI's investments were part of the overall Ponzi scheme, and because the tenant in common syndication began after the transfer. Because of this purported lack of connection between the Ponzi scheme and the purchase of the Property, the Ponzi presumption would not **[*7]** apply and there would not be sufficient evidence of the transferor's fraudulent intent, meaning the trustee could not avoid the two payments Goldsmith received.

The court disagrees. As an initial matter, the bankruptcy court found that DBSI was insolvent and engaged in a Ponzi scheme at the time of the transfers. (ER 115, 121.) Moreover, the bankruptcy court made several other findings, including (1) the payment of earnest money was made by and with funds transferred from DBSI 2006 Land Opportunity Fund ("DBSI 2006 LOF"), to DBSI Housing, Inc., to Kastera, and then to appellant; (2) the payment made at closing was made by and with funds transferred from DBSI 2006 Secured Notes Corp. ("DBSI 2006 Notes"), to DBSI Redemption Reserve ("DRR"), to Title One Corp., and then to appellant; (3) Kastera was not independent, but was dominated and controlled by its 2/3 majority owner, Swenson, in furtherance of DBSI's objectives and designs; (4) DBSI created DBSI Tanana Valley LLC ("DBSI-TV") to, and it did, take title to the

[6] The court assumes, without deciding, that a transfer must be in furtherance of a Ponzi scheme in order to apply the Ponzi presumption.

Property at closing; and (5) the tenant in common solicitations for the Property commenced within months of closing. (ER 115-117, 120-122.)

The bankruptcy court also found that **[*8]** (1) the acquisition of the Property was made at a time when additional tenant in common property was desperately needed by DBSI; (2) the transaction would not have occurred but for DBSI's desire that it occur; (3) DBSI dictated how the acquisition proceeded and was financed; and (4) DBSI quickly put the Property to use as tenant in common inventory after it was acquired. (Id.) These factual findings were not clearly erroneous. In light of these numerous findings, the bankruptcy court did not err in determining that the transfers were in furtherance of the Ponzi scheme.

B. Initial Transferee

Goldsmith's second argument on appeal is that he was not an "initial transferee" of the funds paid to him for the Tanana Valley Property. *Sections 548* and *550* distinguish between initial transferees of property from the debtor, and subsequent (or "immediate" or "mediate") transferees. *Henry v. Official Comm. of Unsecured Creditors of Walldesign, Inc. (In re Walldesign, Inc.), 872 F.3d 954, 961-62 (9th Cir. 2017)*. Specifically, *§ 548(c)* provides that a transferee who acts in good faith "may retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer." *Section 550(b)* bars recovery from a secondary (or "immediate" or "mediate") transferee "that takes for value, . . . in good faith, and without **[*9]** knowledge of the voidability of the transfer avoided."

While the language of these sections is similar, as described by one authority on bankruptcy law, a secondary transferee who acts in good faith need only provide some value, meaning "consideration sufficient to support a simple contract," not necessarily a fair equivalent, to bar all recovery by the trustee. In contrast, an initial transferee who acts in good faith has a defense to recovery only to the extent he or she gave equivalent value to the debtor. 5 Collier on Bankruptcy ¶¶ 548.09[3], 550.03[1] (16th ed. 2019); see also *Brady v. Bestworth-Rommel, Inc. (In re Johnson), 357 B.R. 136, 139-42 (Bankr. N.D. Cal. 2006)*.

The bankruptcy court found that Kastera was the initial transferee of the earnest money payment and Goldsmith was the initial transferee of the closing payment. (ER 126-129.) Goldsmith contends, however, that DBSI-TV was the initial transferee of the closing payment, that he was a good faith, secondary transferee of both payments, and that he gave some value for the Property, meaning that the trustee would not be able to recover any amount from him under *§ 550(b)*.[7]

Under the Bankruptcy Code, not every party who receives or touches property is considered a "transferee" for the purposes of determining whether the transfer **[*10]** is recoverable by the trustee. *In re Incomnet, 463 F.3d 1064, 1070 n.6 (9th Cir. 2006)* (citation omitted). To determine whether a party was an initial transferee to a multi-step transaction, the Ninth Circuit follows the "dominion test." *In re Walldesign, 872 F.3d at 962*. Under this test, "a transferee is one who has dominion over the money or other asset," meaning "the right to put the money to one's own purposes." *Id. at 963* (internal punctuation and citations omitted). In other words, a transferee has dominion if "he is free to invest the whole [amount] in lottery tickets or uranium stocks." Id. (citation omitted). Other parties who receive property in multi-step transactions, without exercising dominion, are considered only "conduits"[8] of the property, not transferees. *In re Incomnet, 463 F.3d at 1070-74*.

---

[7] On appeal, neither party appears to contest the bankruptcy court's finding that Kastera was the initial transferee of the earnest money payment.

[8] A "conduit" refers to a party, frequently a bank, that holds money that was in fact controlled by either the transferor or the real transferee, or that merely passed an asset to the transferee pursuant to a legal or contractual duty, in a multi-step transaction. *In re Incomnet, 463 F.3d at 1070*; *In re Incomnet, Inc., 299 B.R. 574, 578 (B.A.P. 9th Cir. 2003)*.

The dominion test "focuses on whether the recipient of funds has legal title to them and the ability to use them as he sees fit." *Id. at 1071*. Dominion "strongly correlates with legal title," is "akin to legal control," and may be contrasted with "mere possession." *Id. at 1073* (internal punctuation and citations omitted). The first party to establish dominion over the funds after they leave the transferor is the initial transferee, and other transferees are subsequent transferees. *In re Walldesign, 872 F.3d at 962* (citations omitted). This test is more strict than **[*11]** the "control test," which the Ninth Circuit has rejected and which requires courts to "view the entire transaction as a whole to determine who truly had control of the money." Id.

Here, the bankruptcy court found that the funds paid at closing originated with DBSI 2006 Notes, then "through DRR as a wiring intermediary, then through Title One as closing agent," and then "most of those funds were distributed to [appellant] or to others for his benefit." (ER 127.) While Kastera was the initial party to the PSA with Goldsmith, Kastera transferred its interests to DBSI-TV (formed four days before closing to title to the Property) at closing, though DBSI-TV never received or held legal title to the funds. (ER 129.) The fact that under the closing statement DBSI-TV received a loan from DBSI 2006 Notes in the amount of $26,350,000 does not show that DBSI-TV ever had legal title to those funds. The funds never went into a DBSI-TV bank account, but rather from DBSI 2006 Notes to DRR to Title One. Further, the excess funds remaining from the DBSI 2006 Notes transfer after closing were sent to DBSI 2006 LOF at Swenson's direction. (See ER 127-29.)

Appellant contends that while DBSI-TV may not have **[*12]** had legal title over the funds while they were held by Title One, it nevertheless had dominion over the funds at that time because it had authority to direct their disbursement, citing, inter alia, *In re Incomnet, 463 F.3d at 1070, 1073-74* (citations omitted). It is true that under In re Incomnet, there are instances when an entity lacks legal title but still has "sufficient authority over the funds to direct their disbursement." *Id. at 1073-74*. However, that case also explained that "[i]n the vast majority of cases, possessing legal title to funds will equate to having dominion over them." *Id. at 1073*.

Further, In re Incomnet's prototypical example of dominion without legal title is a trustee "who is able to direct the disbursement of the funds in a trust account he manages, even though he does not own them." *Id. at 1074*. That narrow exception does not appear applicable here. While DBSI-TV directed Title One to pay the closing payment to Goldsmith, there is no indication that DBSI-TV had the discretion to direct the disbursement of funds as it saw fit. The bankruptcy court did not clearly err in determining that DBSI-TV "did not have the ability to freely appropriate [the closing payment] funds as they were committed to the closing agent" to complete the amended **[*13]** PSA for the sale of the Tanana Valley Property. (See ER 129.)

Similarly, the bankruptcy court did not err in finding that other entities were not initial transferees. Neither DRR, which received the funds from DBSI 2006 Notes, nor Title One, which received the funds from DRR, had both title and the discretion to manage the funds as they saw fit. Rather, they were merely "conduits" for the funds, and the evidence supports the bankruptcy court's determination that Goldsmith was the first party with legal title and the right to use the funds as it saw fit.[9] Accordingly, the bankruptcy court did not err in finding that Goldsmith was the first party to exercise dominion over the closing payment and was thus the initial transferee.[10]

---

[9] Kastera also never had dominion over the closing funds. Its interests under the PSA were transferred to DBSI-TV before closing, and it had no involvement in the closing.

[10] The court rejects Goldsmith's arguments that he was not the initial transferee of the closing payment because (1) the loan payment was more than the closing payment, (2) the lender (DBSI Notes 2006) transmitted the funds to the closing agent without instructions, (3) the funds remained with the closing agent for an hour before Goldsmith provided the deed and gave the closing instructions, and

C. Single and Unitary Transaction

The court last addresses appellant's argument that the bankruptcy court erred by considering the earnest money payment together with the closing payment for the Tanana Valley Property. In his view, the two transfers must be analyzed separately for the purpose of determining whether the funds were recoverable under *§ 550(b)*.[11] Under this argument, Goldsmith would not be liable for the earnest money payment because he was a secondary **[*14]** transferee who acted in good faith and gave value, and he would only be liable for the closing payment to the extent it exceeded the value of the Property. Because the bankruptcy court found that the value of the Property was $25,480,000, and Goldsmith received only $25,400,000 at closing, Goldsmith would not be liable for any amount, assuming the earnest money payment and closing payments were analyzed separately.

Here, in light of its factual findings, the bankruptcy court did not err in determining that the earnest money payment and the payment at closing were part of a "single and unitary transaction." (See ER 139.) As found by the bankruptcy court, while the payments were made separately, the earnest money requirement and the closing payment requirement both arose out of the same PSA, which was serially amended, and both of which were necessary to purchase the Property. Indeed, the parties drafted various amendments to the original PSA, the closing statement gave the buyer a credit for the earnest money payment, and the PSA provided that if Goldsmith did not transfer the Property at closing, he was required to return the earnest money. (ER 113-115, 140 (and citations therein).) **[*15]** In the words of the bankruptcy court, "[i]t was at all times the same basic contract for the sale of the real estate, though serially amended and completed in two stages." (ER 114.) This finding was not erroneous, in light of the bankruptcy court's factual findings.

The bankruptcy court also did not exceed its authority in treating these two payments as part of a single overall transaction for the purposes of *§ 550(b)*. As stated by the Ninth Circuit, bankruptcy courts are courts of equity "with the power to delve behind the form of transactions and relationships to determine the substance." *Wyle v. C.H. Rider & Family (In re United Energy Corp.), 944 F.2d 589, 596 (9th Cir. 1991)*; see also *Uecker v. Ng (In re Mortg. Fund '08 LLC), Bankr. Case No. 11-49803 RLE, 2013 Bankr. LEXIS 3385, 2013 WL 4475487, *5 (Bankr. N.D. Cal. Aug. 14, 2013)* (under bankruptcy court's power to determine substance of transactions, "a segmented transaction may be viewed as one deal and the parties' labels may not be controlling as to the rights of third parties") (citations omitted).

In *United Energy, 944 F.2d at 596*, the Ninth Circuit found that two contracts were intimately intertwined, notwithstanding the fact that the contracts involved two different transactions involving separate entities, because of the "obvious intent of the parties."[12] Accordingly, the court

(4) DBSI-TV's representative directed the closing agent to pay appellant upon closing. In his view, "control had to exist somewhere," and it remained with DBSI-TV during that one-hour period. However, as mentioned above, the Ninth Circuit has rejected the more lenient "control" test, which looks at the overall transaction "to determine who, in reality, controlled the funds in question." *In re Incomnet, 463 F.3d at 1071*; *Matter of Walldesign, 872 F.3d at 963* (distinguishing the dominion test from the control test); see also *Mano-Y&M, Ltd. v. Field (In re Mortg. Store), 773 F3d. 990, 996 (9th Cir. 2014)* (rejecting Bankruptcy Appellate Panel's analysis in *McCarty v. Richard James Enters. (In re Presidential Corp.), 180 B.R. 233, 238-39 (BAP 9th Cir. 1995)*, because it "turned on whether the funds were being applied for [a party's] benefit and in accordance with his prior wishes," which were equitable considerations more relevant to the control test, instead of "focusing on [the party's] ability to direct the funds to whatever legal end he desired.").

[11] Appellant argues the original PSA was repudiated by the parties and the earnest money was forfeited by Kastera, which is one of the justifications he gives why the earnest money payment and closing payment should be considered separately in assessing whether the trustee may recover from appellant.

[12] In *United Energy, 944 F.2d 589*, the debtor sold solar panels in its solar farm to innocent investors, and the debtor then offered to sell the power generated by those solar panels on behalf of the investors. The solar panels in fact generated little or no electricity but the

looked at both contracts in determining what overall value **[*16]** was received and given by each party. Here, the two payments for the Tanana Valley Property, although made at different times and involving different payees,[13] were similarly intimately intertwined and part of an overall transaction. The obvious intent of the parties was that Goldsmith would transfer the Tanana Valley Property in exchange for the two payments, and the transfer would not occur without both payments. Under these circumstances, the bankruptcy court did not err in considering both payments together in assessing the value received and given by the parties.[14]

Moreover, *§ 548(c)* explicitly directs the court to determine what value was given to the debtor in comparison to the value received by the transferee. See *11 U.S.C. § 548(c)* (stating that a transferee "may retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer"). Such calculation cannot be done here without looking at the earnest money payment and the closing payment together, as both were given by the debtor and its related entities in exchange for the transfer of real property by the transferee, Goldsmith.[15] Omitting the earnest money payment would lead to an **[*17]** undercalculation of the value given by the debtor.[16] Accordingly, the bankruptcy court did not err by (1) considering the two payments as a single transfer under *§ 550(b)* and (2) rejecting Goldsmith's contention that the original sales contract was breached or repudiated and the earnest money was forfeited.

IT IS THEREFORE ORDERED **[*18]** that the

---

debtor paid the investors as part of a Ponzi scheme. The trustee then sought to avoid as fraudulent transfers the payments from the debtor to the investors. The Ninth Circuit held that in determining the value given and received by the innocent investors under *§ 548*, the amount of the debtor's payments should have been reduced by the amount the investors paid for the solar panels. The court explained that, notwithstanding the fact that the solar panel sales and power sales were separate transactions, the transactions were intimately intertwined under the obvious intent of the parties, because the investors were led to believe that their payments for the solar panels and remaining debts for the panels would be offset by the profits from the power sales. *Id. at 596*.

[13] As discussed above, Kastera made the earnest money payment, using funds from DBSI entities, and other DBSI entities made the closing payment through a title company.

[14] Some courts, including the Second Circuit, have explained that multiple transactions may be "collapsed" and treated as steps in a single transaction under fraudulent conveyance laws where (1) a debtor exchanges property for fair consideration and then gratuitously transfers that consideration to a third party, or transfers the consideration for less than fair value, depleting the assets of the debtor; and (2) the initial transferee had actual or constructive knowledge of the scheme rendering the overall transaction fraudulent. See, e.g., *HBE Leasing Corp. v. Frank, 48 F.3d 623, 635, 636 (2d Cir. 1995)*; *In re Sunbeam Corp., 284 B.R. 355, 370-71 (Bankr. S.D.N.Y. 2002)*. Here, while the earnest money and closing payments occurred at different times, this is not a case where the Property was received by DBSI or its entities and then transferred to a third party for less than fair value. Thus, the Second Circuit's collapsing test is inapplicable in this case. Notably, courts discussing this collapsing test have not indicated that this is the only situation where bankruptcy courts may consider two transfers as part of an overall transaction under the Bankruptcy Code. Indeed, in *United Energy, 944 F.2d 589*, the initial transferees (innocent investors) had neither actual or constructive knowledge of the debtor's Ponzi scheme, and there was no allegation that the debtor transferred value received from the investors to a third party for less than fair value. Nevertheless, the court treated the two separate contracts as a single transaction for the purpose of determining the value given and received.

[15] The bankruptcy court found that the applicable statute of limitations is four years under Idaho law, as the Bankruptcy Code allows a trustee to borrow the applicable state law limitations period if it exceeds the normal two-year statute of limitations under *§ 544(b)*. (See ER 111 (citing, inter alia, *Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1111 (9th Cir. 2010)* ("*Section 544* enables a bankruptcy trustee to avoid any transfer of property that an unsecured creditor with an allowable claim could have avoided under applicable state law," and "[t]he purpose of this section was to recognize the body of state laws addressing fraudulent transfers and allow a trustee the choice of avoiding transfers under *§ 544* and the applicable state fraudulent transfer law, or under only federal law pursuant to *§ 548*.") (citation omitted).) Defendant does not contest that finding in his opening brief. See *Eakin v. Goffe, Inc. (In re 110 Beaver Street P'ship), 355 F. App'x 432, 437 (1st Cir. 2009)* (appellant waives any issue it does not adequately raise in its initial brief).

[16] Because the key issue here is the value exchanged by the debtor and transferee, the court rejects Goldsmith's contentions in his briefs or at oral argument that transactions may only be considered together in cases of constructive fraud or when looking at the "transferor side" of the transactions.

bankruptcy court's November 21, 2018 judgment in favor of plaintiff-appellee be, and the same hereby is, AFFIRMED.

Dated: July 2, 2019

/s/ William B. Shubb

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE
