

2004

Jimmy Zufelt v. Haste Inc., and Harry Gounaris : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JIMMY ZUFELT, an individual,	:	
	:	
Plaintiff-Appellee,	:	Case No. 20041043-CA
	:	
vs.	:	
	:	
HASTE, INC., a Utah Corporation, and	:	Court and judge below:
HARRY GOUNARIS, an individual,	:	Fourth Judicial District, Utah County
	:	Judge Fred D. Howard
Defendants-Appellants.	:	Trial Court Case No. 000403084

APPELLANTS' OPENING BRIEF

APPEAL

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FILED
UTAH APPELLATE COURTS
APR 13 2005

(Oral Argument and Published Decision Requested)

Pursuant to Utah Rule of Appellate Procedure 24(a), Defendant-Appellants Haste, Inc. ("Haste, Inc.") and Harry Gounaris ("Gounaris"), (collectively "Appellants"), by and through their counsel John Martinez, hereby submit the following Opening Brief:

LIST OF PARTIES

Jimmy Zufelt, Plaintiff and Appellee

Haste, Inc. and Harry Gounaris, Defendants and Appellants

Stephen W. Rupp, Trustee of the Bankruptcy Estate of Steve Kallinikos, Intervenor

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JURISDICTION OF APPELLATE COURT

The Court of Appeals has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j)(2002) over this case, which was transferred from the Supreme Court under Utah Code Ann. §78-2-2(4)(2002). The Supreme Court had original jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j)(2002)(appeal from final judgment).

ISSUE AND STANDARD OF REVIEW

Issue: Did the trial court erroneously conclude that res judicata barred defendant-appellant Harry Gounaris from asserting defenses on behalf of defendant-appellant Haste, Inc.? (Ruling, dated October 28, 2004) (R. 932-925)(Addendum Exh. 1).

Standard of Review: "A trial court's determination of whether res judicata bars an action 'presents a question of law. We review such questions for correctness, according no particular deference to the trial court.' " Macris & Assocs. v. Neways, Inc., 1999 UT App 230, ¶ 5, 986 P.2d 748 (citation omitted); see also Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶23, 70 P.3d 1 (application of the doctrine of res judicata is a matter of law reviewed for correctness).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE TO THIS APPEAL

There are no constitutional provisions, statutes or rules of central importance to this appeal.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, disposition in court below

This is a case in which the trial court threw out the baby with the bath water.

Appellant Harry Gounaris owned 50% of certain Notes, and was assigned the other 50% by Steven Kallinikos, who subsequently went bankrupt. The Bankruptcy Court thereafter voided the assignment of *the second 50%* as a preferential transfer. The trial court below, however, thereafter held that Appellant Gounaris owned **no part** of the Notes at all! The court thereby threw out Appellant's original 50% ownership (the baby) with the voided 50% assignment (the bath water).

Ownership of the Notes is critical, because one of the notes is the only remaining asset of Haste, Inc., the company at issue in this litigation. Appellant Gounaris contends that he retained his 50% ownership of the Notes, and hence a beneficial interest in Haste, Inc. Thus, he has standing to assert claims and defenses on behalf of Haste, Inc. The trial court erroneously determined that the Bankruptcy Court's judgment voiding the assignment of the second 50% of the subject Notes as a preferential transfer had the effect, through the doctrine of res judicata, of voiding all of Appellant Gounaris' interest in the Notes--and by extension, all of Appellant Gounaris' interest in Haste, Inc. On that basis, the court held that Appellant Gounaris lacked standing to assert claims or defenses on behalf of Haste, Inc. The trial court therefore granted Appellee Zufelt's motion to strike Haste, Inc.'s pleadings and for the entry of judgment, premised on Appellant Gounaris' lack of standing to assert claims or defenses on behalf of Haste, Inc. This appeal ensued.

Statement of Facts

1. On July 6, 1990, Steven Kallinikos and Harry Gounaris incorporated Haste, Inc. for the purpose of doing business as the "Burger Supreme" restaurant located at 1796 North University Parkway, Provo, Utah. Affidavit of Steven Kallinikos ("Kallinikos Aff.") ¶ 2 (R. 355-56) (Addendum Exh. 2); Affidavit of Harry Gounaris ("Gounaris Aff.") ¶ 2 (R. 347-48)(Addendum Exh. 3).

2. Kallinikos operated Burger Supreme, while Gounaris supplied the capital investment necessary to fund the operations of the restaurant. Kallinikos Aff. ¶ 4 (R. 355) (Addendum Exh. 2); Gounaris Aff. ¶ 3 (R. 347)(Addendum Exh. 3).

3. On or about November 1997, Haste, Inc. sold its assets, including Burger Supreme, to Richard Nuttall in exchange for two notes dated November 1, 1997. The first note, for \$15,000, was made payable to Gounaris and Kallinikos personally ("Nuttall Personal Note"). Gounaris and Kallinikos each had a 50% interest in the Nuttall Personal Note. The second note, for \$72,000, was made to Haste, Inc. ("Nuttall Haste, Inc. Note"). Gounaris and Kallinikos likewise each had a 50% interest in the Nuttall Haste, Inc. Note. Kallinikos Aff. ¶ 6 (R. 355)(Addendum Exh. 2); Gounaris Aff. ¶ 5 (R. 347)(Addendum Exh. 3); Bankr. Ct. Findings of Fact and Conclusions of Law ¶ 8 at 2 (R. 468)(Addendum Exh. 4).

5. Only the Nuttall Haste, Inc. Note is at issue in this litigation. Zufelt Mem. 1/17/02 at 10 (R. 300) ("The ... small (Personal) Note ... is not part of this lawsuit.").

6. Haste, Inc. no longer conducted any business after the sale of its assets to Nuttall. Zufelt Mem. 1/17/02 at 9 (R. 301) ("Haste, Inc. no longer conducted any business after the sale of its business to Nuttall."); Kallinikos Aff. ¶ 7 (R. 355)(Addendum Exh. 2); Gounaris Aff. ¶ 6 (R. 347)(Addendum Exh. 3).

7. After the sale of the Haste, Inc. assets to Richard Nuttall, Haste, Inc.'s only asset was the Nuttall Haste, Inc. Note, and its only corporate purpose was to act as recipient of the amounts due thereunder and to distribute the money to Gounaris and Kallinikos. See Kallinikos Aff. ¶ 8 (R. 354-55)(Addendum Exh. 2); Gounaris Aff. ¶ 7 (R. 347)(Addendum Exh. 3).

8. Haste, Inc. continued to receive the payments under the Nuttall Haste, Inc. Note, which were distributed for a time half to Gounaris and half to Kallinikos. However, sometime in 1999, Kallinikos experienced financial difficulty and stopped remitting to Gounaris his portion of the Nuttall Haste, Inc. Note proceeds. Kallinikos Aff. ¶ 9 (R. 354)(Addendum Exh. 2); Gounaris Aff. ¶ 8 (R. 346)(Addendum Exh. 3); Bankr. Ct. Findings of Fact and Conclusions of Law ¶ 9 at 3 (R. 468)(Addendum Exh. 4).

9. In March 1998, unbeknownst to Gounaris, Kallinikos executed a Lease Agreement with Appellee Zufelt. Kallinikos Aff. ¶ 10 (R. 354)(Addendum Exh. 2); Gounaris Aff. ¶ 9 (R. 346)(Addendum Exh. 3).

10. Although the Lease Agreement between Kallinikos and Zufelt indicates that Haste, Inc. entered into the lease, Kallinikos entered the lease personally, without informing Gounaris, and without authority from Haste, Inc. Kallinikos Aff. ¶ 11 (R. 354)(Addendum

Exh. 2); Gounaris Aff. ¶ 10 (R. 346)(Addendum Exh. 3).

11. The Lease Agreement was personally guaranteed by Kallinikos. Zufelt Mem. 1/17/02 Ex. A at 1 (R. 294).

12. Kallinikos intended to start a new restaurant business on the leased premises. Kallinikos Aff. ¶ 10 (R. 354)(Addendum Exh. 2).

13. The new business venture started by Kallinikos on the leased premises provided no benefit to Gounaris or to Haste, Inc. Kallinikos Aff. ¶ 10 (R. 354)(Addendum Exh. 2); Gounaris Aff. ¶ 9 (R. 346)(Addendum Exh. 3).

14. In April, 1999, Kallinikos abandoned the leased premises. Kallinikos Aff. ¶ 12 (R. 354)(Addendum Exh. 2).

15. In May and June 1999, Gounaris took out an equity line-of-credit loan on his home and used the money to lend Kallinikos an additional \$20,000. Kallinikos Aff. ¶ 13 (R. 353)(Addendum Exh. 2); Gounaris Aff. ¶ 11 (R. 346)(Addendum Exh. 3); Zufelt Mem. 1/17/02 at Exh. C (cancelled checks on Gounaris' home equity line of credit) (R. 255-56).

16. In addition to the \$20,000 loan, Kallinikos owed Gounaris back payments for the proceeds from the Nuttal Haste Inc. Note and the Nuttal Personal Note that Kallinikos had neglected to forward to Gounaris. Kallinikos Aff. ¶ 9 (R. 354)(Addendum Exh. 2); Gounaris Aff. ¶ 11 (R. 346)(Addendum Exh. 3).

17. Zufelt knew that Kallinikos alone stood behind the Lease Agreement because Kallinikos explained exactly that to Zufelt. Kallinikos Aff. ¶ 14 (R. 353)(Addendum Exh. 2).

18. Kallinikos never told Zufelt that Haste, Inc. assets were available to satisfy Kallinikos' obligations pursuant to the Lease Agreement. Kallinikos Aff. ¶ 14 (R. 353)(Addendum Exh. 2).

19. As a result, in October 1999, Zufelt negotiated a compromise with Kallinikos personally (not with Haste, Inc.) for the amounts due and owing under the Lease Agreement as of April 1999, when Kallinikos abandoned the premises. Kallinikos Aff. ¶ 14 (R. 353)(Addendum Exh. 2).

20. Zufelt did not look to Haste, Inc. to satisfy the amounts due and owing pursuant to the Lease Agreement Kallinikos entered into with Zufelt. Kallinikos Aff. ¶ 14 (R. 353)(Addendum Exh. 2).

21. In order to compromise the amount owed to Zufelt by Kallinikos, on October 19, 1999, Kallinikos executed a personal Promissory Note [hereinafter "Kallinikos Compromise Promissory Note"] in favor of Zufelt. Kallinikos Aff. ¶ 15 (R. 353)(Addendum Exh. 2).

22. The Kallinikos Compromise Promissory Note obligates only Kallinikos, not Haste, Inc. See Zufelt Mem. 1/17/02 Ex. B at 1 (identifying only Kallinikos as the maker of the Kallinikos Compromise Promissory Note) (R. 280).

23. By the Kallinikos Compromise Promissory Note, Zufelt and Kallinikos intended to resolve all obligations pursuant to the Lease Agreement. Kallinikos Aff. ¶ 15 (R. 353)(Addendum Exh. 2).

24. On or about February 2000, Gounaris demanded that Kallinikos repay the \$20,000 Gounaris had loaned to him in 1999, as well as to account for money received by Kallinikos on the Nuttall Personal Note and the Nuttall Haste, Inc. Note that should have gone to Gounaris but was instead converted by Kallinikos. Kallinikos Aff. ¶ 16 (R. 352-53)(Addendum Exh. 2); Gounaris Aff. ¶ 13 (R. 345)(Addendum Exh. 3).

25. Kallinikos was unable to repay Gounaris except through an assignment of Kallinikos' remaining 50% interest in the Nuttall Personal Note and in the Nuttall Haste, Inc. Note. Thus, on February 25, 2000, Kallinikos assigned his remaining 50% interest in both the Nuttall Personal Note and the Nuttall Haste, Inc. Note to Gounaris. See Kallinikos Aff. ¶ 17 (R. 352)(Addendum Exh. 2); Gounaris Aff. ¶ 14 (R. 345)(Addendum Exh. 3); Bankr. Ct. Findings of Fact and Conclusions of Law ¶16 at 4 (R. 466)(Addendum Exh. 4).

26. On February 13, 2001, Kallinikos filed for bankruptcy protection. (R. 468).

27. On June 18, 2001, Stephen W. Rupp, the Trustee for the bankruptcy estate of Kallinikos ("Trustee") filed an adversary proceeding in the Kallinikos bankruptcy alleging that the assignment by Kallinikos of his interest in the Nuttall Personal Note and the Nuttall Haste, Inc. Note to Gounaris constituted preferential transfers and should be avoided. See Bankr. Ct. Findings of Fact and Conclusions of Law (R. 469)(Addendum Exh. 4). Significantly, the Trustee did not allege Kallinikos owned and had assigned 100% of Haste, Inc. to Gounaris, but only that Kallinikos "assigned a 50% interest in two promissory notes to Harry Gounaris ... and that the assignment was avoidable as a preferential transfer... ." (R. 469).

28. On July 25, 2002, the Bankruptcy Court made findings of fact and conclusions of law and entered an order avoiding the transfer of Kallinikos' 50% interest in the Nuttall Personal Note and in the Nuttall Haste, Inc. Note to Gounaris as preferential transfers pursuant to 11 U.S.C. § 547. See Bankr. Ct. Findings of Fact and Conclusions of Law (R. 469)(Addendum Exh. 4).

29. Significantly, however, the Bankruptcy Court specifically ordered that *only Kallinikos' interest* in the Nuttall Personal Note and the Nuttall Haste, Inc. Note were recaptured back into Kallinikos' bankruptcy estate. See id. at 4 (R. 466)("Finding 17. [Kallinikos] transferred **his interest** in the Notes to [Gounaris]... .")(emphasis added); id at 5 (R. 465)("...the principle(sic) balance due on the Haste, Inc. note was \$54,749.52, and on the [Nuttall Personal] note was \$11, 724.54. Half of the balances of the two notes ... was \$33,207.03 (sic: \$33,237.03)"); Bankr. Ct. Judgment (R. 452)(Addendum Exh. 5)("the Debtor's interest"); see also Trustee's Notice of Bankruptcy Court's Findings of Fact and Conclusions of Law and Judgment at 2 (R. 470)("By this Notice, the bankruptcy Trustee hereby gives notice to this Court and the parties in this litigation of the bankruptcy estate's **one-half interest** and ownership of the two notes...")(emphasis added).

30. On July 16, 2002, the Trustee moved to intervene in the District Court below. At the same time, the Trustee moved the District Court to strike the pleadings filed by Haste, Inc. and for entry of default judgment against Haste, Inc. See Trustee's Motion to Intervene, Motion to Strike, Motion for Entry of Default Judgment (R. 415).

31. On April 4, 2003, the District Court granted only the Trustee's Motion to Intervene. See Minute Entry, April 4, 2003 (R. 544); Order, August 8, 2003 (R. 698).

32. On May 16, 2003, the Trustee renewed his motion to strike Haste, Inc.'s pleadings and to enter default against Haste, Inc., arguing that Appellant Gounaris lacked standing to assert defenses on behalf of Haste, Inc. See Trustee's Motion to Intervene, Motion to Strike, Motion for Entry of Default Judgment (R. 562). The Court denied the Trustee's motion to strike Haste, Inc.'s pleadings and also denied entry of default judgment against Haste, Inc. See Minutes of Hearing, August 8, 2003 (R. 692)("Mr. Rupp addresses the Court regarding the motion to strike...The Court finds there are issues of fact remaining and denies this motion."); see also Order, August 8, 2003 (R. 698)(only intervention granted).

33. On June 1, 2004, and for the third go-around, Zufelt filed an identical motion to strike Haste, Inc.'s pleadings and for the entry of judgment based on a lack of standing by Gounaris to assert defenses on behalf of Haste, Inc. See Zufelt's Motion to Strike or Dismiss or for Entry of Judgment (R. 824 (motion); R. 851 (supporting memorandum)).

34. On October 28, 2004, the Court granted Zufelt's motion. The Court's ruling was predicated on the application of res judicata regarding the issue of who owned Haste, Inc. The Court concluded that Appellant Gounaris had litigated the ownership issue in the adversary proceeding in Bankruptcy Court and that the Bankruptcy Court had concluded that Kallinikos was 100% owner of Haste, Inc.--thereby nullifying the original 50% interest in the Nuttall Haste, Inc. Note that unquestionably belonged to Gounaris all along. Based on that conclusion, the Court ruled that Gounaris lacked standing to assert defenses on behalf

of Haste, Inc., struck Haste, Inc.'s pleadings and granted the previously denied Motion for Summary Judgment against Appellants Gounaris and Haste, Inc. (R. 932--925)("Ruling").

SUMMARY OF ARGUMENT

The District Court erroneously concluded that the doctrine of res judicata barred Gounaris from asserting defenses on behalf of his co-defendant Haste, Inc. Kallinikos filed for bankruptcy on February 13, 2001. The Trustee in bankruptcy filed an adversary proceeding against Gounaris asserting that the assignments of the Nuttall Haste, Inc. Note and the Nuttall Personal Note to Gounaris were preferential transfers and should be set aside. The Bankruptcy Court agreed with the Trustee and on July 25, 2002 issued an order and judgment holding the assignments of the notes were avoidable under Bankruptcy Code Section 547 as preferential transfers.

Misinterpreting the Bankruptcy Court's order, the District Court below concluded that res judicata barred Gounaris from claiming an ownership interest in Haste, Inc. And since Gounaris thus was held to lack an ownership interest in Haste, Inc., the Court ruled further that he lacked standing to assert defenses on Haste, Inc.'s behalf. The District Court's conclusions were clearly erroneous. First, the issue of Haste, Inc. ownership was not addressed by the Bankruptcy Court. The issue thus was not "completely, fully and fairly litigated" in the bankruptcy court as required for the application of res judicata. Consequently, res judicata has no application.

Second, and quite contrary to the District Court's basis for finding res judicata applied, to the extent the bankruptcy court even tangentially touched on the issue of ownership of

Haste, Inc., the bankruptcy court found that Gounaris was indeed an owner. Most significantly, the Bankruptcy Court's ultimate ruling in the adversary proceeding supports the conclusion that Gounaris owns one-half of Haste, Inc. As an owner of Haste, Inc., Gounaris has standing to assert defenses on behalf of Haste Inc., and the District Court's judgment finding otherwise should be reversed.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY APPLIED THE DOCTRINE OF RES JUDICATA BECAUSE THE ISSUE OF GOUNARIS' OWNERSHIP INTEREST IN HASTE, INC. WAS NOT "IDENTICAL" TO ANY ISSUE RAISED IN THE BANKRUPTCY COURT, AND BECAUSE SUCH ISSUE WAS NOT "COMPLETELY, FULLY AND FAIRLY LITIGATED" IN THE BANKRUPTCY COURT

The District Court improperly applied the doctrine of res judicata to conclude that Gounaris lacked an ownership interest in Haste, Inc. First, that issue was not "identical" to any issue determined by the bankruptcy court. Second, even if that issue *had* been presented to the bankruptcy court, it was not "completely, fully and fairly litigated" in that court. For each of these two independent reasons, res judicata does not apply.

"The doctrine of res judicata serves the important policy of preventing previously litigated issues from being re-litigated." Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 57, 44 P.3d 63. The doctrine describes the binding effect of a previous adjudication on a current adjudication. See Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4402 (1981). The general term "res judicata" is an umbrella concept that refers to two distinct branches of the doctrine: claim preclusion and issue preclusion. See Macris & Assocs., Inc. v. Neways, Inc.,

2000 UT 93, ¶ 19, 16 P.3d 1214 (citing Swainston v. Intermountain Health Care, 766 P.2d 1059, 1061 (Utah 1988)). Claim preclusion applies where both cases involve the same parties or their privies. Macris, 2000 UT 93, ¶ 20. Issue preclusion applies where the issue litigated is identical in both actions, although the parties are not. Id. ¶ 19. Because Appellee Zufelt was not a party to the adversary proceeding in the bankruptcy court, the District Court's application of res judicata concerned issue preclusion.

Issue preclusion can yield unjust results if applied without reasonable consideration and due care. Parklane Hosiery Co. Inc. v. Shore, 4339 U.S. 322, 330-31 (1979). In this case the burden of establishing that issue preclusion applies is on Zufelt. Ruling at 4 (R. 929)(Addendum Exh. 1)(citing PGM, Inc. v. Westchester Investment Partners, Ltd., 2000 UT App 20, ¶ 5, 995 P.2d 1252); see also Mel Trimbel Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 453-55 (Utah App. 1998).

The District Court held that issue preclusion precluded Appellant Gounaris from asserting that he had an ownership interest in Haste, Inc., and that therefore, Gounaris lacked standing to assert claims or defenses on behalf of Haste, Inc. Ruling at 4 (R. 929)(Addendum Exh. 1). In order for issue preclusion to apply to prevent a party from re-litigating an issue previously decided by another court, four elements must be met:

(i) the party against whom issue preclusion is asserted must have been a party or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Gynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1; Snyder v. Murray City Corp.,

2003 UT 13, ¶ 35, 73 P.3d 325; Timm v. Dewsnap, 851 P.2d 1178, 1184 (Utah 1993); Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). If any one of these elements is not present, then issue preclusion is inappropriate. Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 245 (Utah 1992). Here, the issues addressed in the Bankruptcy Court are not "identical" to the ownership interest ruled upon by the District Court. Moreover, the issue of ownership of Haste, Inc. was not "completely, fully and fairly litigated" in the Bankruptcy Court. Consequently, the District Court improperly applied issue preclusion to the issue of Gounaris' ownership in Haste, Inc.

A. The issue of Gounaris' ownership interest in Haste, Inc. was not "identical" to any issue raised in the Bankruptcy Court

Issue preclusion requires that the factual issue decided in the prior action must be identical to the factual issue presented in the second action. Robertson v. Campbell, 674 P.2d 1226, 1230 n.1 (Utah 1983). The issues must be "precisely the same." Wilde v. Mid-Century Ins. Co., 635 P.2d 417, 419 (Utah 1981); accord Schaer v. Utah Dep't of Transportation, 657 P.2d 1337, 1341 (Utah 1983)(holding issues litigated in a prior proceeding must be "precisely the same" as those raised in the present action).

The District Court found that "the Bankruptcy Court heard evidence and made findings regarding [Gounaris'] ownership interest in Haste, Inc." Ruling at 5 (R. 928)(Addendum Exh. 1). That simply is not the case. On the contrary, the Bankruptcy Court expressly stated:

"no documentation has been offered to indicate when or how [Gounaris] relinquished his ownership interest in Haste, Inc."

Bankr. Ct. Findings of Fact and Conclusions of Law ¶23 at 5(R. 465)(Addendum Exh. 4).

The issue that *was* decided by the Bankruptcy Court was whether the transfers to Gounaris of *Kallinikos' interest* in the Nuttall Haste, Inc. Note and the Nuttall Personal Note were preferential transfers and avoidable under the bankruptcy code. See Bankr. Ct. Findings of Fact and Conclusions of Law (R. 469)(Addendum Exh. 4). Specifically, the Bankruptcy Court found: a transfer of Debtor's property occurred; Gounaris "was a creditor of the Debtor"; the transfer occurred within one year of Debtor's Chapter 7 filing; the Debtor was insolvent at the time; and Gounaris was an insider. Id. at 10-14 (R. 460-456). The issue of who owned Haste, Inc., was neither a finding nor a conclusion reached by the Bankruptcy Court. That issue simply was not addressed by the Bankruptcy Court.

This case is similar to Schaer v. Utah Dep't of Transportation, 657 P.2d 1337 (Utah 1983), in which the Court addressed the application of issue preclusion to a determination that the dugway road was a public thoroughfare. The Utah Department of Transportation (UDOT) argued that issue preclusion prevented a property owner from asserting that the dugway road was a public thoroughfare because in a prior suit, the property owner had claimed severance damages resulting from a condemnation proceeding in which the property owner claimed his property was effectively landlocked. Id. at 1338. UDOT asserted that the Court's prior ruling that the property owner's land was landlocked implied a finding that the dugway road was not a public thoroughfare, and that therefore, the doctrine of issue preclusion prevented the property owner from re-litigating the issue. Id. at 1340. The Utah Supreme Court rejected UDOT's argument.

The Schaer case emphasized that the relevant inquiry is "whether the issues actually litigated in the first action are precisely the same as those raised in the present action." Id. at 1341 (quoting Wilde v. Mid-Century Insurance Co., 635 P.2d 417, 419 (Utah 1981)(emphasis added); see also American Interstate Mortgage Corp. v. Edwards, 2002 UT App 16, ¶ 34, 41 P.3d 1142 (identical issues that were not fully litigated in prior proceeding not subject to issue preclusion). "[T]he doctrine of [issue preclusion] 'does not apply to issues that merely could have been tried' in the prior case, but operates *only to issues which were actually asserted and tried* in that case." Id. at 1341 (quoting International Resources v. Dunfield, 599 P.2d 515, 517 (1979)(emphasis in original). The Utah Supreme Court concluded in Schaer that the prior proceeding did not "rule conclusively on the status of the dugway road," and as a result, the Court held that issue preclusion was inapplicable. Id. The same situation is present here.

The District Court itself recognized that the Bankruptcy Court had not addressed the identical issue. In its Order, the District Court "notes that while the Bankruptcy Court's Findings of Fact and Conclusions of Law may not address the precise issue with perfect clarity, the Court finds that reasonable conclusions can be drawn from the testimony and evidence presented before the Bankruptcy Court..." Ruling at 5-6 (R. 928-27)(Addendum Exh. 1). The Utah Supreme Court in Schaer held that issue preclusion requires much more. The Court in Schaer held it improper to make inferences and piecemeal conclusions based on a prior decision. Schaer, 657 P.2d at 1341. The *identical* issue must have been decided by the Bankruptcy Court for issue preclusion to apply here. It was not. Hence, issue preclusion

does not apply.

B. The issue of Gounaris' ownership interest in Haste, Inc. was not "fully and fairly litigated" in the Bankruptcy Court

Even assuming *ex arguendo* that the issue of Gounaris' ownership interest in Haste, Inc. was raised in the Bankruptcy Court, it certainly was not "completely, fully and fairly" litigated there. In order for an issue to be "completely, fully and fairly litigated," as required for the application of res judicata, it must have been "actually litigated" in the first action. Aragon v. Clover Club Foods Co., 857 P.2d 250, 254 n.6 (Utah App. 1993); International Resources v. Dunfield, 599 P.2d 515, 517 (1979)(issue preclusion operates only to issues which were actually asserted and tried in the prior case). The issues actually litigated in the first suit must have been essential to the resolution of that action. Robertson v. Campbell, 674 P.2d 1226, 1230 (Utah 1983). That is not the case here.

The Bankruptcy Court did not resolve the broad issue of ownership of Haste, Inc. subsequent to Kallinikos' bankruptcy--much less the narrower issue of Gounaris' ownership interest in Haste, Inc. In fact, it was completely unnecessary for the Bankruptcy Court to examine the Haste, Inc. ownership question at all in order for the Court to reach the conclusion that the assignment of Kallinikos' interest in the Nuttall Personal Note and the Nuttall Haste, Inc. Note constituted preferential transfers. Quite simply, the ownership of Haste, Inc. was not "essential to the resolution" of the adversary proceeding. Robertson, 674 P.2d at 1230.

The Bankruptcy Court *did hold* that the assignment of Kallinikos interest in the Nuttall Personal Note and the Nuttall Haste, Inc. Note to Gounaris were preferential transfers

pursuant to 11 U.S.C. § 547. Under Section 547 of the Bankruptcy Code, a transfer is avoidable if it: (1) is of an interest of the debtor in property; (2) is for the benefit of a creditor; (3) is made for or on account of an antecedent debt owed by the debtor before the transfer was made; (4) is made while the debtor is insolvent; (5) is made on or within ninety days before the date the bankruptcy petition was filed; and (6) allows the creditor to receive more than the creditor would otherwise be entitled to receive from the bankruptcy estate. See In re Ogden, 314 F.3d 1190, 1196 (10th Cir. 2002)(citing 11 U.S.C. § 547 (b)). The Bankruptcy Court Order addressed each of these elements. Bankr. Ct. Conclusions of Law at 10-15 (R. 460-55)(Addendum Exh. 4). The judgment goes no further. In fact, the Bankruptcy Court even refused to determine whether the transfers in question were avoidable under other sections of the Bankruptcy Code or whether the transfers violated the Utah Fraudulent Transfer Act. Id. at 15 (R. 455).

Plainly, the issue of Gounaris' ownership interest in Haste, Inc. was not an issue "actually litigated" in the Bankruptcy proceeding. Thus, on its face, the Bankruptcy Court's Order demonstrates that the ownership issue was not "completely, fully and fairly" litigated in the Bankruptcy Court.

II. TO THE EXTENT THE BANKRUPTCY COURT ADDRESSED THE ISSUE OF OWNERSHIP OF HASTE, INC., THE COURT CONCLUDED GOUNARIS WAS AN OWNER

The Bankruptcy Court's findings and conclusions preclude the application of res judicata because to the extent the court addressed the issue of ownership of Haste, Inc., the Court concluded that Gounaris *was* an owner of the company.

The Bankruptcy Court's factual findings state: "The Defendant [Gounaris] was a 50% stockholder, officer and director of Haste, Inc." Bankr. Ct. Findings of Fact ¶3 at 2 (R. 468)(Addendum Exh. 4). And the Court further finds that "[Kallinikos and Gounaris] each owned a 50% interest in the Haste, Inc. Note." Id. ¶8 at 2 (R. 468). The Court concludes that Kallinikos only "had a one-half interest in the [Nuttal Haste, Inc.] note". Bankr. Ct. Conclusions of Law at 11 (R. 459)(Addendum Exh. 4). These findings are inconsistent with a finding that Kallinikos owned 100% of Haste, Inc., and that all of Haste, Inc. hence became part of Kallinikos' bankruptcy estate. The Court acknowledged that the note was "payable to Haste, Inc." Id. ¶8 at 2 (R. 468). If Kallinikos had owned all of Haste, Inc., then he also would have owned 100% of the note. But the Bankruptcy Court held instead that Gounaris owned half of the note. Since the note was the only asset Haste Inc. retained, Gounaris therefore had an ownership interest in Haste, Inc.

In addition, one of the conclusions reached by the Bankruptcy Court was that Gounaris was an insider of the Debtor Kallinikos. Bankr. Ct. Conclusions of Law at 13 (R. 457)(Addendum Exh. 4). To make that finding, the Court stated that "[s]ince Defendant [Gounaris] ... directly owned 20 percent of Haste, Inc. which was an insider of the Debtor [Kallinikos], the Defendant [Gounaris] was also an insider." Id. The Court further noted: "even in spite of the Debtor's schedules that indicate at the time of filing he still owned 50% of Haste, Inc., were the court to conclude that Defendant [Gounaris] did not maintain an ownership interest in Haste, Inc., as of the date of the Transfer, the Defendant is still an insider." Id. The Court merely posed a hypothetical, however, and never squarely addressed

that issue.

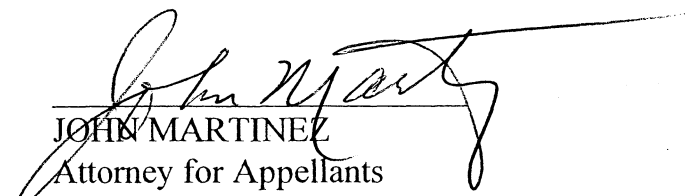
Quite the contrary, the Bankruptcy Court's ultimate ruling on the issue of preferential transfer demonstrates that the Court concluded that Gounaris indeed owned 50% of Haste, Inc. The Court's order requires only that the 50% portion of the Nuttall Personal Note and the Nuttall Haste, Inc. Note become part of the bankruptcy estate. If, as Zufelt claimed, the Bankruptcy Court had found Kallinikos owned 100% of Haste, Inc., then correspondingly, Kallinikos would have owned 100% of the Nuttall Haste, Inc. Note, not the 50% the Court dictated was part of the bankruptcy estate. Thus, the Bankruptcy Court's final order directly contradicts Zufelt's claim that the Bankruptcy Court held Kallinikos owned 100% of Haste, Inc.

The plain language of the Bankruptcy Court's Order and the conclusions it reached clearly demonstrate that the Bankruptcy Court did not determine that Gounaris had no ownership interest in Haste, Inc. As a result, the District Court below improperly applied the doctrine of res judicata to preclude Gounaris from asserting defenses on behalf of Haste, Inc.

CONCLUSION

This Court should reverse the final judgment by the trial court and remand the case for further proceedings.

DATED this 13th day of April, 2005.


JOHN MARTINEZ
Attorney for Appellants
Haste, Inc. and Harry Gounaris

ADDENDUM

- Exhibit 1:** Trial Court Ruling, dated October 28, 2004 (R. 932-925).
- Exhibit 2:** Affidavit of Steven Kallinikos (R. 355-56).
- Exhibit 3:** Affidavit of Harry Gounaris (R. 347-48).
- Exhibit 4:** Bankruptcy Court Findings of Fact and Conclusions of Law (R. 469-454).
- Exhibit 5:** Bankruptcy Court Judgment (R. 453-451).

EXHIBIT 1

FILED
Fourth Judicial District Court
of Utah County, State of Utah

9/27/04 MR Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JIMMY ZUFELT, an individual, Plaintiff, vs. HASTE, INC.; a Utah corporation; and HARRY GOUNARIS, an individual, Defendants.	RULING RE: PLAINTIFF'S MOTION TO STRIKE OR DISMISS, OR ENTER JUDGMENT FOR LACK OF STANDING Case # 000403084 Judge Fred D. Howard Division 5
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This matter comes before the Court on Plaintiff's *Motion to Strike or Dismiss, or Enter Judgment for Lack of Standing*. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

FACTUAL SETTING

Haste Inc. (Haste) was incorporated in Utah in 1990 as a subchapter S corporation with Harry Gounaris and Steve Kallinikos as equal shareholders, holding and owning 500 shares each of the common stock of the corporation.

In November of 1997, Haste sold a restaurant known as Burger Supreme to Richard and Connie Nuttall (Nuttals). The Nuttals gave two notes as consideration for the restaurant. The larger note in the original amount of \$72,000 was made payable to Haste. The smaller note in the original amount of \$15,000 was made payable to Gounaris and Kallinikos.

In 1998, Kallinikos and or Haste entered into a lease with Plaintiff for acquisition of the premises of a new restaurant business. Kallinikos abandoned the premises of the lease in April 1999. The obligation that remained owing to Plaintiff was converted into a note in October 1999 for \$28,000 owed by Kallinikos.

From November 1, 1997, through early 1999, the distribution of payments on the Notes was 50-50 between Kallinikos and Gournaris. From the latter part of 1999 through February 2000, more of the payments were distributed to Kallinikos than Gournaris. Kallinikos experienced financial difficulty and stopped remitting Gournaris' portion of the Notes' proceeds to him and instead kept the bulk of the proceeds from both Notes for himself. By affidavit, Gournaris and Kallinikos stated that in May and June 1999, Gournaris loaned Kallinikos \$20,000, and that Kallinikos owed Gournaris proceeds from the Larger Note and the Smaller Note that Kallinikos had neglected to forward to Gournaris.

On or about November 27, 2000, Gournaris corresponded with the Nuttalls and represented to them that he had purchased the Notes as of February 25, 2000, for the sum of \$12,000 and \$3,000, and directed Nuttall to pay all future amounts owing to Gournaris. The assignment of the Notes by Haste and Kallinikos to Gournaris rendered Haste and Kallinikos insolvent or they became insolvent as a result of the assignment. Kallinikos filed a voluntary Chapter 7 petition for bankruptcy on February 13, 2001.

Before the Bankruptcy Court, both Gournaris and Kallinikos testified that the \$20,000

transfer was not a loan, but instead represented payment on the sale of Kallinikos' interests in the Notes to Gournaris. The Bankruptcy Court found that the testimony given by Kallinikos and Gournaris lacked credibility and further found that the \$20,000 transfer constituted a loan. The only way Kallinikos could repay the loan was through assignment of his interest in the two Notes to Gournaris. Kallinikos transferred his interest in the Notes to Gournaris by assignment sometime after February 24, 2000. The Bankruptcy Court found that Kallinikos' transfer of his interest in the Notes to Gournaris made him and Haste insolvent, and that the transfer was based on antecedent debt which occurred within a year of the date of the chapter 7 filing and the Court avoided the transfer.

Gournaris testified at the Bankruptcy Trial that after the sale of Burger Supreme, he no longer participated in Haste. Kallinikos' Statement of Affairs indicate that he held a 50% interest in Haste at the time of bankruptcy.

RULING

The Court notes that Plaintiff filed a Motion to Strike or Dismiss, or Enter Judgment For Lack of Standing on June 1, 2004. Defendants filed a memorandum in opposition on June 20, 2004. Plaintiff contends that Stephen Rupp ("Trustee"), Trustee of the bankruptcy estate of Steven Kallinikos, is 100% owner of all stock in Haste and as such, Gournaris ("Defendant") lacks standing to act on behalf of Haste. Plaintiff asserts that the issue of ownership was

previously litigated in Bankruptcy Court and collateral estoppel precludes Defendant from re-litigating the issue of ownership in Haste before this Court. Defendant contends that he is and always has been 50% owner of Haste and as such, he is entitled to a portion of Haste's assets and has standing to assert Haste's interests.

"The doctrine of res judicata serves the important policy of preventing previously litigated issues from being relitigated." *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 57, 44 P.3d 63 (quotations and citations omitted). This doctrine embodies two separate theories, "claim preclusion and issue preclusion." *Sevy v. Security Title Co.*, 902 P.2d 629, 632 (Utah 1995). Under either of these branches, "[t]he burden of establishing the elements of res judicata is upon" Plaintiff. *PGM, Inc. v. Westchester Investment Partners, Ltd.*, 2000 UT App 20, ¶ 5, 995 P.2d 1252. To prevent relitigation of an issue in a subsequent action:

(i) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1 (citation omitted).

Whether or not collateral estoppel bars Defendant's claims is a question of law.

Grynberg, 2003 UT 8 at ¶ 23. First, it is clear that Defendant was both a party and privy to the

action in the Bankruptcy Court. Steve Kallinikos was the debtor in the Bankruptcy Court action and Defendant Gournaris was the defendant.

Second, while the ultimate issue before the Bankruptcy Court was whether Kallinikos' transfer of his interest in the Notes to Defendant constituted a loan or payment, or whether the transfer was fraudulent, the Bankruptcy Court also heard evidence and made findings regarding Defendant's ownership interest in Haste. The ultimate issue before this Court is Defendant's ownership interest in Haste.

Third, Defendant had an opportunity to fully and fairly litigate the issue regarding his ownership interest in Haste. Defendant testified before the Bankruptcy Court that he "relinquished his ownership interest in Haste" and that "he no longer participated in" Haste after the sale of Burger Supreme. Defendant also provided the Bankruptcy Court with tax returns showing that he had relinquished his ownership interest in Haste. The Bankruptcy Court found that Defendant relinquished his ownership interest in Haste, and noted that Defendant failed to offer any documentation indicating when or how this was accomplished.

And fourth, the case before the Bankruptcy Court resulted in a final judgment on the merits wherein the Bankruptcy Court avoided Kallinikos' transfer to Defendant.

The Court notes that while the Bankruptcy Court's Findings of Fact and Conclusions of Law may not address the precise issue with perfect clarity, the Court finds that reasonable conclusions can be drawn from the testimony and evidence presented before the Bankruptcy

Court which support a finding that issue preclusion is applicable. Specifically, Defendant was given the opportunity to prove his ownership interest in Haste during the Bankruptcy Court proceedings. In an effort to show the Bankruptcy Court that Defendant no longer retained an ownership interest in Haste, Defendant presented tax returns that show he had relinquished any ownership interest in Haste by 1998. Further, in paragraph 23 of its Findings of Fact, the Bankruptcy Court found, “[Kallinikos] testified that after the sale of Burger Supreme, he continued doing business through the Haste, Inc. entity. However, the Defendant [Gournaris] testified he no longer participated in the entity.”

The Court finds that it would be a miscarriage of justice to allow Defendant to assert his non-ownership position before the Bankruptcy Court, and then before this Court, switch his position and assert he has always retained a 50% ownership interest in Haste. The Court notes the findings of the Bankruptcy Court which concluded that Defendant’s testimony was self serving and lacked credibility. For example, in paragraph 10, the Bankruptcy Court found, “[Kallinikos] and Defendant have given inconsistent and conflicting testimony regarding a transfer of [Kallinikos’] interest in the two Notes.” In its Conclusions of Law, the Bankruptcy Court rejected Defendant’s “self serving and unexplained about face” regarding his affidavit averments concerning the transfer of the Notes, and also his conflicting testimony at trial “to better accommodate the Defendant’s defense in this proceeding.” In the Findings, paragraph 15, the Bankruptcy Court further remarks on Defendant’s credibility, calling his relationship with

Kallinikos and Haste a “convoluted and perhaps tax driven manner.”

The Court observes that these findings and conclusions suggest that Defendant and Kallinikos used Haste for their own improper purposes indicating less than straightforward legal pursuits. Such behavior does not support the objective of the Court to seek and satisfy the interests of justice.

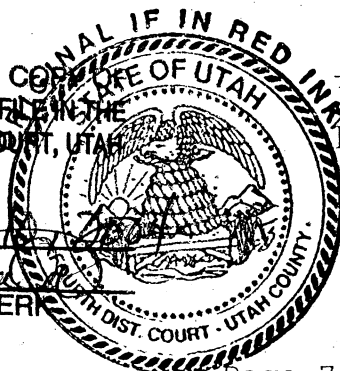
In conclusion, the Court is persuaded that Defendant has no ownership interest in Haste, and therefore, Defendant lacks standing to act on behalf of Haste in this matter. Accordingly, the Court grants Plaintiff’s motion to strike Defendant’s pleadings. The Court further will consider anew Plaintiff’s motion for summary judgment. Given the Bankruptcy Court’s findings, the Court finds there are no genuine issues of material fact which are in dispute. Therefore, the Court finds that Plaintiff is entitled to judgment as a matter of law. Counsel for Plaintiff is instructed to prepare an order consistent with this ruling.

Dated this 27th day of September, 2004.

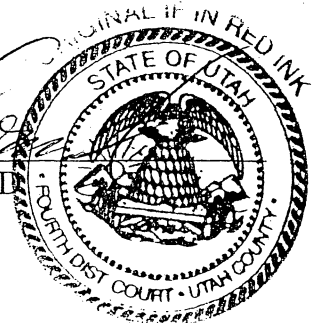
BY THE COURT:

I CERTIFY THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

DATE: November 1, 2004
[Signature]
DEPUTY COURT CLERK



[Signature]
JUDGE FRED D. HOWARD
District Court Judge



CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 27 day of September, 2004 to the following in the manner indicated, to wit:

by U.S. first class mail

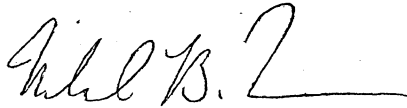
Attorney for Plaintiff:

Steven F. Allred
Troom Park, 584 S. State Strret
Orem, UT 84058

Attorneys for Defendant:

Nick Colesides
466 South 400 East
Salt Lake City, UT 84111

Stephen W. Rupp
McKay Burton & Thurman
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133



Deputy Court Clerk

EXHIBIT 2

restaurant named Burger Supreme located at 1796 North University Parkway, Provo, Utah.

3. Harry Gounaris at all times relevant herein was and still is a resident of the State of Illinois.

4. I operated Burger Supreme and Gounaris supplied the capital investment necessary to fund the operations of the restaurant.

5. Throughout Haste, Inc.'s existence, Gounaris loaned substantial sums to the company in order to sustain operations.

6. On or about November 1997, Haste, Inc. sold all its assets, including Burger Supreme, to Richard Nuttall in exchange for two notes dated November 1, 1997. The first note in the amount of \$15,000 was made to Gounaris and to me personally ("Personal Note"). Gounaris and I each had a 50% interest in the Personal Note. The second note in the amount of \$72,000 was made to Haste, Inc. ("Haste, Inc. Note"). Gounaris and I also each owned a 50% interest in the Haste, Inc. Note.

7. Haste, Inc. no longer conducted any business after the sale of all its assets to Nuttall.

8. After the sale of the Haste, Inc. assets to Richard Nuttall, Haste, Inc.'s only purpose was to act as recipient of

the amounts due under the Haste, Inc. Note and distribute those funds to Gounaris and me.

9. Haste, Inc. continued to received the payments under the Haste, Inc. Note, which were distributed for a time half to Gounaris and half to me. However, at some point in 1999, I experienced financial difficulty and stopped remitting Gounaris' portion of the Note proceeds to him. Instead I kept the bulk of the proceeds from both the Personal and Haste, Inc. Notes for myself.

10. Unbeknownst to Gounaris, in March 1998, I executed a Lease Agreement with Jimmy Zufelt. I personally guaranteed the Lease Agreement. At the time I executed the Lease Agreement, I intended to start a new restaurant business in the leased premises. That new business venture provided no benefit to Gounaris or to Haste, Inc. and was entirely my own personal venture.

11. Although, the Lease Agreement indicates that Haste, Inc. entered into the lease, I entered the lease personally without informing Gounaris and without authority from Haste, Inc..

12. In April, 1999, I abandoned the leased premises.

13. In May and June 1999, Gounaris loaned me \$20,000. In addition to the \$20,000 loan, I owed Gounaris proceeds from the Haste, Inc. Note and the Personal Note that I had neglected to forward to Gounaris.

14. Zufelt knew that I alone stood behind the Lease Agreement because I explained exactly that to Zufelt. I never told Zufelt that Haste, Inc. assets were available to satisfy my personal obligation pursuant to the Lease Agreement. As a result in October 1999, Zufelt and I negotiated a compromise of the amounts due and owing under the Lease Agreement at the time I abandoned the premises. Because Zufelt knew that I alone was obligated under the Lease Agreement Zufelt did not look to Haste, Inc. to satisfy the amounts due and owing pursuant to that agreement.

15. In order to compromise the amount I owed to Zufelt, I personally executed a Promissory Note in favor of Zufelt. Both Zufelt and I understood that the Promissory Note only obligated me, not Haste, Inc.. By that Promissory Note Zufelt and I intended to resolve all obligations pursuant to the Lease Agreement.

16. On or about February, 2000, Gounaris demanded that I

repay the \$20,000 he had loaned to me and account for money I received from the Personal Note and the Haste, Inc. Note.

17. I was unable to repay Gounaris except through an assignment of his interest in the Personal Note and the Haste, Inc. Note. Thus, on February 25, 2000, I assigned my right in the Personal Note and Haste, Inc.'s rights in the Haste, Inc. Note to Gounaris.

18. By the transfer to Gounaris, I did not intend to defraud any of my creditors. Rather the transfer to Gounaris was intended to satisfy an obligation to Gounaris stemming from the 1997 sale of Haste, Inc.'s business to Nuttall and to repay loans he made to me.

19. After the February 25, 2000 assignment to Gounaris of the Personal Note and the Haste, Inc. Note, I forwarded all payments I received pursuant to those notes directly to Gounaris. I did not retain control over those funds after the transfer was effectuated.

20. I received reasonably equivalent value in return for the assignment of my interest in the Personal Note and the Haste, Inc. Note to Gounaris. Gounaris already owned a 50% interest in both the Haste, Inc. Note and the Personal Note stemming from the

sale of Burger Supreme to Nuttall. Thus, I assigned only my 50% interest in the notes to Gounaris. At the time of the assignment, Gounaris had recently loaned me \$20,000 drawn from Gounaris' home equity line of credit. I had also borrowed portions of the note proceeds belonging to Gounaris. Gounaris canceled those borrowed amounts in exchange for the assignment. Thus, Gounaris paid approximately \$25,000 for the assignment from me of the Personal Note and the Haste, Inc. Note.

21. At the time of the assignment of the Haste, Inc. Note, Gounaris had no reason to believe that I was insolvent and in fact at the time of the assignment to Gounaris I was not insolvent.

Dated this 24 day of January, 2002.


STEVE KALLINIKOS

STATE OF ILLINOIS)
 : ss
COUNTY OF COOK)

On the 27th day of January, 2002, personally appeared before me Steve Kallinikos, who being by me duly sworn, did say, that he is the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

My Commission Expires:

Frank R Wiemerslage
NOTARY PUBLIC, Residing in
COOK COUNTY,
State of ILLINOIS



CERTIFICATE OF SERVICE

Filed the original of the foregoing to:

DISTRICT COURT CLERK
FOURTH JUDICIAL DISTRICT
125 NORTH 100 WEST
PROVO UT 84601-2849

and served a copy thereof to the attorney for plaintiff addressed
as follows:

MR STEVEN F ALLRED ESQ
ATTORNEY AT LAW
TROON PARK
584 SOUTH STATE
OREM UTAH 84058

_____ via hand delivery
_____ via fax: 801.225-3658
X _____ via first class mail, postage prepaid

this 28th day of January, 2002.



EXHIBIT 3

NICK J COLESSIDES (# 696)
Attorney at Law
466 South 400 East, # 100
Salt Lake City, Utah 84111-3325
Tele: (801) 521-4441

Attorney for defendants
Haste, Inc., and Harry Gounaris

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY
STATE OF UTAH

JIMMY ZUFELT,	:	
an individual,	:	
	:	
Plaintiff,	:	AFFIDAVIT OF HARRY GOUNARIS
	:	
v.	:	
	:	
HASTE, INC., a Utah	:	
corporation, and	:	Case No.: 00 04 03084
HARRY GOUNARIS	:	
	:	
Defendant,	:	Judge: Taylor

I, Harry Gounaris, being duly sworn, hereby state as follows:

1. I am competent to testify as to the matters set forth herein. That the facts stated hereinbelow are based upon my own personal knowledge, and that the said facts are admissible in evidence in these proceedings.

2. On or about July 6, 1990, Steve Kallinikos and I incorporated Haste, Inc. for the purpose of doing business as a

restaurant named Burger Supreme located at 1796 North University Parkway, Provo, Utah.

3. Kallinikos operated Burger Supreme and I supplied the capital investment necessary to fund the operations of the restaurant.

4. Throughout Haste, Inc.'s existence, I loaned substantial sums to the company in order to sustain operations.

5. On or about November 1997, Haste, Inc. sold all its assets, including Burger Supreme, to Richard Nuttall in exchange for two notes dated November 1, 1997. The first note in the amount of \$15,000 was made to me and Kallinikos personally ("Personal Note"). Kallinikos and I each had a 50% interest in the Personal Note. The second note in the amount of \$72,000 was made to Haste, Inc. ("Haste, Inc. Note"). Kallinikos and I likewise had a 50% interest in the Haste, Inc. Note.

6. Haste, Inc. no longer conducted any business after the sale of all its assets to Nuttall.

7. After the sale of the Haste, Inc. assets to Richard Nuttall, Haste, Inc.'s only purpose was to act as recipient of the amounts due under the Haste, Inc. Note and distribute those funds to me and Kallinikos.

8. Haste, Inc. continued to receive the payments under the Haste, Inc. Note, which were distributed for a time half to me and half to Kallinikos. However, at some point in 1999, Kallinikos experienced financial difficulty and stopped remitting my portion of the Note proceeds to me.

9. Unbeknownst to me and without my authority, in March 1998, Kallinikos executed a Lease Agreement with Jimmy Zufelt. Kallinikos intended to start a new restaurant business in the leased premises. That new business venture provided no benefit to me or to Haste, Inc..

10. Although the Lease Agreement between Zufelt and Kallinikos indicates that Haste, Inc. entered into the lease, Kallinikos entered the lease personally without informing me and without authority from Haste, Inc..

11. In May and June 1999, I loaned Kallinikos \$20,000. In addition to the \$20,000 loan, Kallinikos owed me proceeds from the Haste, Inc. Note and the Personal Note that he had neglected to forward to me.

12. Zufelt did not look to Haste, Inc. to satisfy the amounts due and owing pursuant to the Lease Agreement Kallinikos entered into with Zufelt.

13. On or about February, 2000, I demanded that Kallinikos repay the \$20,000 I had loaned to him and account for money received on the Personal Note and the Haste, Inc. Note that should have come to me but was instead kept by Kallinikos.

14. Kallinikos was unable to repay me except through an assignment of his interest in the Personal Note and the Haste, Inc. Note. Thus, on February 25, 2000, Kallinikos assigned his rights in both the Personal Note and the Haste, Inc. Note to me.

15. The assignment of the Notes to me was intended to satisfy Haste, Inc.'s obligation to me stemming from the 1997 sale of Haste, Inc.'s business to Nuttall and to repay loans made by me to Kallinikos.

16. After the February 25, 2000 assignment to me of the Personal Note and the Haste, Inc. Note, Kallinikos forwarded all payments he received pursuant to those notes directly to me. Kallinikos and Haste, Inc. did not retain control over those funds after the transfer was effectuated.

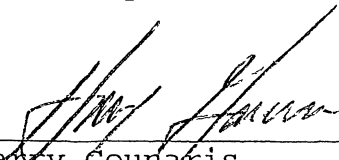
17. Kallinikos received reasonably equivalent value in return for the assignment of his interest in the Personal Note and the Haste, Inc. Note. I already owned a 50% interest in both the Haste, Inc. Note and the Personal Note stemming from the sale

of Burger Supreme to Nuttall. Thus, Kallinikos assigned only his 50% interest in the notes to me.

18. At the time of the assignment, I had recently loaned Kallinikos \$20,000 drawn from my home equity line of credit. Kallinikos had also borrowed portions of the note proceeds belonging to me. I forgave those debts in exchange for the assignment. Thus, I paid approximately \$25,000 for the assignment of the Personal Note and the Haste, Inc. Note.

19. At the time of the assignment of the Haste, Inc. Note, I had no reason to believe that Kallinikos was insolvent.

Dated this 24TH day of January, 2002.




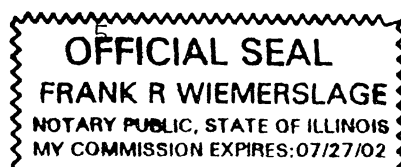
Harry Gounaris

STATE OF ILLINOIS)
: SS
COUNTY OF COOK)

On the 24th day of January, 2002, personally appeared before me Harry Gounaris, who being by me duly sworn, did say, that he is the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

My Commission Expires:


NOTARY PUBLIC, Residing in
COOK COUNTY,
State of ILLINOIS



CERTIFICATE OF SERVICE

Filed the original of the foregoing to:

DISTRICT COURT CLERK
FOURTH JUDICIAL DISTRICT
125 NORTH 100 WEST
PROVO UT 84601-2849

and served a copy thereof to the attorney for plaintiff addressed
as follows:

MR STEVEN F ALLRED ESQ
ATTORNEY AT LAW
TROON PARK
584 SOUTH STATE
OREM UTAH 84058

_____ via hand delivery
_____ via fax: 801.225-3658
X _____ via first class mail, postage prepaid

this 28th day of January, 2002.

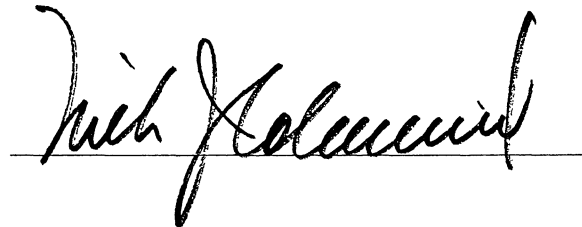
A handwritten signature in black ink, appearing to read "Nick Kalamand", is written over a horizontal line.

EXHIBIT 4

FILED
JUL 26 2012
FEDERAL BANCROPTCY COURT
DISTRICT OF UTAH

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	Bankruptcy Number 01-21857
	:	
STEVE KALLINIKOS and DEBBIE	:	Chapter 7
KALLINIKOS	:	
	:	
	:	
Debtors.	:	
	:	
STEPHEN W. RUPP, Chapter 7 Trustee,	:	Adversary Proceeding Number 01-2192
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HARRY GOUNARIS,	:	
	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is under advisement after trial of the Chapter 7 Trustee's (Trustee) complaint seeking avoidance of a transfer under 11 U.S.C. § 547¹ and U.C.A. § 25-6-6(2), and 11 U.S.C. § 548(a)(1)(b) and U.C.A. §§ 25-6-5(1)(b) and 25-6-6(1). The Trustee's complaint alleges that Steve Kallinikos, the debtor herein (Debtor), assigned a 50% interest in two promissory notes to Harry Gounaris (Defendant), and that the assignment was avoidable as a preferential transfer pursuant to § 547 of the Code or, alternatively, that the assignment was an avoidable fraudulent

¹ Future references are to title 11 on the United States Code, unless otherwise noted.

transfer under § 548 of the Code, and §§ 25-6-5 and 25-6-6(2) of Utah's Uniform Fraudulent Transfer Act. The court has now heard the evidence and arguments of counsel, and has made an independent review of applicable case law. The court has also judged the credibility of the witnesses, and has concluded, as set forth below, that portions of the testimony of both the Debtor and the Defendant lack credibility. Pursuant to Fed. R. Bankr. P. 7052, the court's findings of fact and conclusions of law are set forth below.

FINDINGS OF FACT

1. The Debtor filed a voluntary Chapter 7 petition on February 13, 2001.
2. The Debtor was a principal, 50% stockholder and officer of Haste, Inc.
3. The Defendant was a 50% stockholder, officer and director of Haste, Inc.
4. Haste, Inc., was a subchapter S Corporation.
5. The Debtor and Defendant had been friends prior to their entering into the Haste, Inc. business venture, and have continued that relationship.
6. The Defendant lives in Des Plaines, Illinois. The Debtor has moved from Utah to Des Plaines, Illinois.
7. Haste, Inc. sold a restaurant known as Burger Supreme to Richard and Connie Nuttall (Nuttals) in November 1997.
8. In consideration for the sale, the Nuttalls paid a portion of the purchase price in cash at the time of sale, and also executed two notes. The Nuttalls executed a note payable to Haste, Inc., in the amount of \$72,000 to be paid by 118 monthly payments with interest at the rate of 9%. The Debtor and Defendant each owned a 50% interest in the Haste, Inc. Note. The Nuttalls also executed a note to the

Debtor and the Defendant in the amount of \$15,000 to be paid by 123 monthly payments with interest at the rate of 9%. The notes are secured by the restaurant property. (Hereafter "the Notes".)

9. From November 1, 1997, through early 1999, the distribution of payments on the notes was 50-50 between Defendant and Debtor. From the latter part of 1999 through February 2000, more of the payments were distributed to the Debtor than the Defendant. The Debtor experienced financial difficulty and stopped remitting the Defendant's portion of the Notes' proceeds to him and instead kept the bulk of the proceeds from both Notes for himself.
10. The Debtor and Defendant have given inconsistent and conflicting testimony regarding a transfer of the Debtor's interest in the two Notes.
11. By affidavits filed in the Fourth Judicial District Court in and for Utah County, State of Utah in the case of Jimmy Zufelt v. Haste, Inc. and Harry Gounaris, case no. 00-04-0384, both Defendant and Debtor stated that in May and June 1999, Defendant loaned the Debtor \$20,000, and that the Debtor owed the Defendant proceeds from the Haste, Inc. note and the personal note that the Debtor had neglected to forward to the Defendant.
12. The affidavits also state that in February 2000, the Defendant demanded that the Debtor repay the \$20,000 loan and account for money the Debtor had received from the Notes.
13. The Debtor and Defendant testified in this trial that, directly contrary to their statements in the affidavits, the transfer of the \$20,000 from the Defendant to the

Debtor was not a loan, but instead represented payment on the sale of the Debtor's interests in the Notes to the Defendant.

14. Rather than the \$20,000 set forth in the affidavits, the Defendant testified that he transferred to the Debtor \$10,000 and \$5,000 in cash, and also credited a \$2,000 debt the Debtor owed to him, as well as 6 payments on the Notes that the Debtor appropriated for himself, for a total payment by the Defendant to the Debtor of \$23,000. The Defendant testified that the method he used to transfer the cash funds to the Debtor was for the Defendant to write home equity loan checks, not to the Debtor but instead to his own company. The Defendant's company then allegedly changed the funds into cash which was given to the Debtor.
15. Judging the credibility of the statements of the Defendant and the Debtor, the court finds that the payment of funds from the Defendant to the Debtor, in whatever convoluted and perhaps tax driven manner, constituted a loan from the Defendant to the Debtor.
16. Upon Defendants subsequent demand for repayment of the loan, the only way the Debtor was able to repay the Defendant was through assignment of the Debtor's interest in the two Notes.
17. The Debtor transferred his interest in the Notes to the Defendant by assignment sometime after February 24, 2000 (Transfer).
18. A statement dated February 25, 2000, typed at the bottom of each note indicates that each note was assigned by the Debtor to the Defendant.
19. The Defendant has admitted the following:

- a. The actual date of the assignments of the Notes was February 25, 2000.
 - b. The amount of the consideration for the assignments was determined by negotiation based upon monies delivered to the Debtor in May and June 1999.
20. Exhibit "D" dated November 27, 2000, is the only written notice of any assignment of the Notes given to Richard Nuttall.
21. Exhibit "D" evidences that the Notes were transferred directly from Debtor to Defendant.
22. As of February 12, 2001, the principle balance due on the Haste, Inc. note was \$54,749.52, and on the \$15,000 note was \$11,724.54. Half of the balances of the two notes as of February 12, 2001, was \$33,207.03.
23. The Debtor testified that after the sale of Burger Supreme, he continued doing business through the Haste, Inc. entity. However, the Defendant testified he no longer participated in the entity. No documentation has been offered to indicate when or how the Defendant relinquished his ownership interest in Haste, Inc.
24. The Debtor's Statement of Affairs, Paragraph 16, indicate that the Debtor had only a 50% interest in Haste, Inc., operated as Golden Burger and Teriyaki Express, and listed as currently in good standing but not operating as of the date of the filing of the Chapter 7 petition.
25. In 1998 the Debtor and or Haste, Inc. entered into a lease with Jimmy Zufelt for acquisition of the premises of a new restaurant business, which the Debtor called Nikos Teriyaki Express. The Debtor abandoned the premises of the lease in April

1999. The obligation that remained owing to Zufelt was converted into a note in October 1999, for \$28,000 owed by the Debtor. The Debtor's Chapter 7 schedules list the obligation owed by the Debtor to Zufelt as a noncontingent, liquidated and undisputed claim for \$32,875.

26. The Debtor filed a federal income tax return for 1998 for Haste, Inc., dba Nikos Teriyaki Express with a business address of Des Plaines, IL.
27. In 1999, the Debtor entered into a 10 to 15 year lease with Courtyard at Jamestown Associates for the premises upon which he operated a new restaurant business. This business was operated by Haste, Inc., dba the Golden Burger.
28. The Debtor utilized the cash proceeds from the sale of Burger Supreme to purchase equipment for Golden Burger. The Debtor pledged all the equipment to Courtyard at Jamestown Associates to secure the lease. The Golden Burger business was operated for approximately 8 months. The business suffered significant losses. The Debtor surrendered the leased premises and the equipment to Courtyard at Jamestown Associates, and the equipment was sold at sheriffs' sale.
29. Courtyard at Jamestown Associates is listed as a creditor in the Debtor's Chapter 7 schedules with an uncontingent, liquidated and undisputed claim of \$50,000.
30. For 14 months prior to filing the Chapter 7 petition the Debtor was not paying his obligations related to Golden Burger and Teriyaki Express to the State Tax Commission as they became due.

31. A statement of assets, liabilities and stockholder's equity for Haste, Inc., dated December 31, 1999, reflects total assets of \$103,068.51 and liabilities of \$7,880.85. The document does not reflect a debt, secured or otherwise, to Courtyard at Jamestown Associates.
32. The 1999 Haste, Inc. Federal income tax return reflects a \$50,479 loss. It also reflects total assets of \$103,069.
33. The \$103,069 listed as assets on the 1999 Haste, Inc. Federal income tax return does not reflect the equity that existed in Haste, Inc., assets at that time.
34. No place on Schedule "L" of the tax returns for Haste, Inc. for the years, 1998, 1999, or 2000 is there any scheduling of the Haste, Inc. Note.
35. A statement of assets, liabilities and stockholder's equity for Haste, Inc., dated July 31, 2000, reflects total assets of \$67,781.25 and liabilities of \$24,523.37. The document does not reflect a debt, secured or otherwise, to Courtyard at Jamestown Associates.
36. The Debtor ceased operating Golden Burger in May of 2000.
37. The statement of revenues and expenses dated July 31, 2000, reflects a year to date net loss of \$48,258.78.
38. Haste, Inc.'s accountant testified that if all of Haste, Inc.'s, assets were pledged to a creditor with a debt that exceeded the value of assets, there would be no equity in the business.
39. The court finds that, as of the date of the Transfer, no equity existed in Haste, Inc. for either the Debtor or the Defendant.

40. Debtor's amended schedules list \$146,235.87 in unsecured nonpriority claims.
41. The Debtor's schedules list \$12,000 in priority tax claims and \$14,000 in secured claims.
42. The Debtor incurred the following debt on the designated dates:
 - a. Standard Restaurant, \$7,165.52 on June 15, 1999.
 - b. Canyon View Medical and Utah Valley Radiology, \$1,004.53 in 1997, 1999, and after the subject Transfer, in May 2000.
 - c. RSI Restaurant Specialist, \$3,018.48 on February 26, 1999.
 - d. ARC, \$847.35 during January 20, 1999, through December 11, 1999.
 - e. IHC, \$1,621.85 on May 13, 1999.
 - f. Jimmy Zufelt, \$28,800 on October 19, 1999.
43. The Debtor owed in excess of \$41,000 prior to the Transfer, not including any personal liability for unpaid corporate sales taxes or the liability to Canyon View Medical and Utah Valley Radiology.
44. The Debtor's schedules list \$36,445 in joint assets, including an overencumbered 1996 V-6 Audi Quattro Wagon titled in the name of Haste, Inc., with a loan in Debbie Kallinikos' name, and a leased 1996 Dodge Dakota.
45. The Debtor's schedule B, Personal Property, does not list any cash on hand or in accounts.
46. The Debtor's Statement of Affairs, Paragraph 11 lists a closed financial account at Key Bank.

47. The Debtor testified that he had \$7,000 to \$8,000 in savings from the time he was operating Burger Supreme until 2001 or 2002. This asset, if it existed, was undisclosed on the Debtor's schedules, even as amended.
48. The Debtor testified that he did not know it was necessary to list the \$7,000 to \$8,000 in savings on his schedules. This testimony is not credible, and, if the funds existed on the date of the Transfer, they were concealed from creditors.
49. The Debtor received a total of approximately \$24,000 from the March, 2000, sale of his Mapleton home owned jointly by he and his wife.
50. As of the date of the Transfer, the Debtor was entitled to exempt his share of the equity in his residence.
51. In response to the Trustee's request for the production of prepared and filed state and federal income tax returns for the years 1998, 1999, 2000, the Debtor has stated:
- "The significant business losses, medical problems, extremely low personal income by both debtors (Mr. and Mrs. Kallinikos) during the years 1998, 1999, and 2000, and the absence of any asset other than the assigned promissory note cast doubt as to the Trustee's need for these tax returns to administer the bankruptcy estate."
52. The Debtor has stated and scheduled under oath that his only income in years 1999 and 2000 were payments received on the Notes. He declared receiving \$7,000.00 per year.
53. The Debtor's assets at the time of the Transfer, exclusive of his interest in the two Notes, the concealed cash if it existed, and the exempt equity in his home, were valued at less than his debt.

54. The Debtor was not paying his debts as they became due at the time of the Transfer.
55. The Trustee filed the within complaint on June 18, 2001, seeking avoidance of the Transfer and for a money judgment against the Defendant for \$35,000 or an amount to be proven at trial.
56. Unsecured claims totaling \$63,994.71 have been filed against this estate, which is insolvent.
57. For some period of time, payments on the Notes have been tendered to the Fourth Judicial District Court in and for Utah County, State of Utah in the case of Jimmy Zufelt v. Haste, Inc. and Harry Gounaris, case no. 00-04-0384.

From the forgoing Findings of Fact the court makes the following

CONCLUSIONS OF LAW

This Court has jurisdiction over the parties and subject matter of this complaint. The matter is Core pursuant to 28 U.S.C. § 157(b)((F) and (H), and the court may enter a final order. The Trustee has the burden of proving the avoidability of the Transfer under § 547(b), and the Defendant has the burden of proving the nonavoidability of the transfer under § 547(c).

The court will first consider the Trustee's First Claim for Relief plead under § 547 and U.C.A. §§ 25-6-6(2) of the Utah Uniform Fraudulent Transfer Act. The Trustee must prove all the elements of § 547² in order to avoid the transfer of the Debtor's interest in the Notes to the

²

11 U.S.C. § 547(b) states:

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

Defendant. The Trustee has proven that the Transfer of the Debtor's interest in the Notes constituted a transfer of the Debtor's interest in property. Even though one note was payable to Haste, Inc., the Debtor had a one-half interest in the note, and transferred his interest therein to the Defendant.

At the time of the Transfer the Defendant was a creditor of the Debtor and the Defendant therefore held an antecedent debt. The Debtor and Defendant's testimony on whether the funds transfer from the Defendant to the Debtor was a loan or evidenced the Defendant's purchase of the Notes directly conflict with their prior affidavits filed in the state court action. Without explanation, they both now tell a different story to better accommodate the Defendant's defense in this proceeding. The court rejects this self serving and unexplained about face and determines that the more credible evidence is that the Defendant made a loan to the Debtor that was unpaid at the time of the Transfer.

The Transfer occurred at the earliest on February 25, 2000, and was therefore within a year of the date of the Debtor's chapter 7 filing. Section 547(e)(2)(B) states that a transfer is made "at the time such transfer is perfected, if such transfer is perfected after . . . 10 days." Perfection of the promissory notes occurs when "a creditor on a simple contract cannot acquire a

-
- (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) while the debtor was insolvent;
 - (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
 - (5) That enables such creditor to receive more than such creditor would receive if —
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

judicial lien that is superior to the interest of the transferee.” § 547(e)(1)(B). Perfection of the Transfer of the Notes was accomplished when Defendant took possession of them, on or about February 25, 2000. Therefore, the transfer took place, as argued by the Trustee, at least within the one-year preference period which applies to insiders.

The Trustee has carried his burden to prove that the Debtor was insolvent³ at the time of the Transfer. The evidence indicates that the Debtor owed in excess of \$41,000 prior to the Transfer, not including any personal liability for unpaid corporate sales taxes or the liability to Canyon View Medical and Utah Valley Radiology. The Debtor’s assets, at fair valuation, were less than his debts. The equity the Debtor may have held in his jointly-owned residence is excluded from the insolvency analysis. Likewise, the cash of \$7,000 to \$8,000 the Debtor testified he maintained, and which was undisclosed on his schedules, is excluded. It is simply disingenuous for the Debtor to testify he didn’t understand he was obligated to disclose this asset on his schedules, assuming it existed, and the only conclusion the court can draw is that he concealed the cash with the intent to hinder his creditors. Further, the Debtor cannot rely upon his interest in the alleged equity in Haste, Inc. to establish his solvency, because the assets of Haste, Inc. were fully encumbered.

³

11 U.S.C. § 101(32) “insolvent” means—

- (A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation, exclusive of—
 - (i) property transferred, concealed, or removed with intent to hinder, delay or defraud such entity’s creditors; and
 - (ii) property that may be exempted from property of the estate under section 522 of this title

The court also concludes that the Defendant was an insider of the Debtor for two reasons. First, the Defendant falls within the statutory definition under §101(31)(A)(iv) which provides that an insider includes a corporation of which the debtor is a director, officer, or person in control, and § 101(31)(E) which provides that an insider is an “affiliate, or insider of an affiliate as if such affiliate were the debtor. §§ 101(31)(A)(iv) and (E). An affiliate is further defined as an “entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor” § 101(2)(a). Since the Defendant was an entity that directly owed 20 percent of Haste, Inc., which was an insider of the Debtor, the Defendant was also an insider. Second, even in spite of the Debtor’s schedules that indicate at the time of filing he still owned only 50% of Haste, Inc., were the court to conclude that the Defendant did not maintain an ownership interest in Haste, Inc., as of the date of the Transfer, the Defendant is still an insider. The list in § 101(31)(A) was not meant to be all-inclusive. By using the non-limiting term “includes,” Congress suggested that § 101(31)(A) is not limited to those specific instances, but was to be “flexibly applied on a case-by-case basis.” *Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.)*, 712 F.2d 206, 210 (5th Cir. 1983). *See, In re Krehl*, 86 F.3d 737, 741 (10th Cir. 1996). Congress further suggested that the term insider included “one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.” H.R. Rep. No. 95-595, at 312, 1978 U.S.C.C.A.N.. 5963, 6269. “In ascertaining insider status, then, courts have looked to the closeness of the relationship between the parties and to whether any transaction between them were conducted at arm’s length.” *In re Krehl*, 86 F.3d at 742. Here, the Debtor and Defendant have a close friendship which began prior to entering into the Haste, Inc. venture

and continues today, even to the point that the Defendant and Debtor synchronize their testimony in this proceeding that is inconsistent with their prior testimony.⁴ This close personal relationship led to a loan and the assignment of the Notes in payment thereof, that was not done at arms length. The Defendant availed himself of his relationship with the Debtor to benefit himself over all other creditors in obtaining full repayment of the debt owed to him. Defendant was an insider according to how Congress intended insider to be defined under § 547(b).

Finally, this estate is not solvent. Therefore, the Defendant received more in repayment of his antecedent debt than other creditors. Applying the facts found above to the statutory requirements necessary to prove a preferential transfer, the court concludes that the Trustee has met his burden. The Defendant, however, has failed to prove any of the exceptions to avoidance set forth in § 547(c). As a result, the Trustee is entitled to judgment avoiding the transfer of the Debtor's interests in the two notes.

The Defendant argues that he is entitled to setoff the debt owed to him that would be created by the avoidance of the transfer, against any recovery obtained by the estate. This is incorrect. Section 553 only allows entities that owe each other money to apply their mutual debts against each other. Mutuality requires that the offset be between valid and enforceable prepetition debts owed by the debtor to the creditor, against valid and enforceable prepetition claims owed by the debtor to the creditor. *Tuttle v. Buckner (In re Buckner)*, 218 B.R. 137, 145 (10th Cir. BAP 1998). The Defendant cannot offset a postpetition claim against the estate against because there is no mutuality. Further, § 550 allows property to be recovered for the benefit of

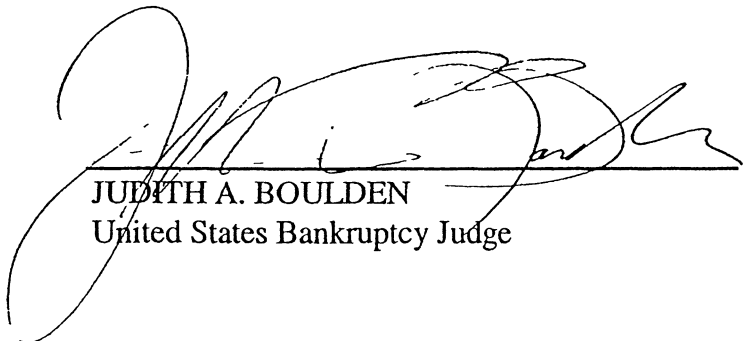
⁴ See, *Pfeiffer v. Thomas (In re Reinbold)*, 182 B.R. 244, 246 (N.D. Ohio 1986) (holding that defendant's close personal friendship with debtor deserved greater scrutiny); *Koch v. Rogers (In re Broumas)*, 1998 WL 77842, at *7-8 (4th Cir. 1995) (debtor's and defendant's close friendship warranted careful scrutiny).

the estate. *Research-Planning v. Segal (In re First Capital Mortgage Loan Corp.)*, 917 F.2d 424, 428 (10th Cir. 1990) (*en banc*) (it is not equitable that one general unsecured creditor of the estate should be made whole by virtue of the exercise of the trustee's avoidance powers which others must make do with their share of the bankruptcy estates under section 726). The Defendant's argument that he is entitled to setoff is rejected.

CONCLUSION

The Trustee is entitled to a judgment avoiding the transfer of the Debtor's interest in the Notes pursuant to § 547. It is therefore unnecessary to determine whether the Trustee may also be entitled to avoid the transfer of the Debtor's interest in the Notes pursuant to § 548 or U.C.A. § 25-6-5(1)(b) and § 25-6-6-(1) of the Utah Uniform Fraudulent Transfer Act. The court will reserve any ruling on a money judgment against the Defendant and in favor of the estate pending the filing of a complaint pleading § 550 which shall be brought within the time allowed in § 550(f), and a determination of any amount actually received by the Defendant that is property of this estate.

DATED this 25 day of July, 2002.



JUDITH A. BOULDEN
United States Bankruptcy Judge

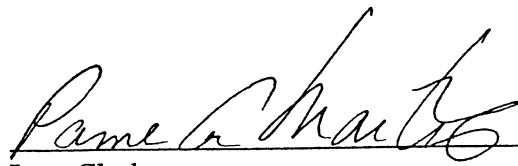
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Certificate of Mailing

I hereby certify that I mailed, postage prepaid, a copy of the forgoing **Findings of Fact and Conclusions of Law** to the following, on this 25 day of July, 2002.

Stephen W. Rupp
McKay, Burton & Thurman
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133
Attorneys for the Trustee

Nick J. Colessides
Attorney at Law
466 South 400 East #100
Salt Lake City, UT 84111-3325
Attorney for Defendant



Law Clerk

EXHIBIT 5

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:	:	Bankruptcy Number 01-21857
	:	
STEVE KALLINIKOS and DEBBIE	:	Chapter 7
KALLINIKOS	:	
	:	
	:	
Debtors.	:	
<hr/>		
STEPHEN W. RUPP, Chapter 7 Trustee,	:	Adversary Proceeding Number 01-2192
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HARRY GOUNARIS,	:	
	:	
Defendant.	:	
<hr/>		

JUDGMENT

This matter is under advisement after trial of the Chapter 7 Trustee's (Trustee) complaint seeking avoidance of a transfer under 11 U.S.C. § 547¹ and U.C.A. § 25-6-6(2), and 11 U.S.C. § 548(a)(1)(b) and U.C.A. §§ 25-6-5(1)(b) and 25-6-6(1). The Trustee's complaint alleges that Steve Kallinikos, the debtor herein (Debtor), assigned a 50% interest in two promissory notes to Harry Gounaris (Defendant), and that the assignment was avoidable as a preferential transfer pursuant to § 547 of the Code or, alternatively, that the assignment was an avoidable fraudulent

¹ Future references are to title 11 on the United States Code, unless otherwise noted.

transfer under § 548 of the Code, and §§ 25-6-5 and 25-6-6(2) of Utah's Uniform Fraudulent Transfer Act. The court has now heard the evidence and arguments of counsel, and has made an independent review of applicable case law. The court has also judged the credibility of the witnesses. Accordingly, the court has entered Findings of Fact and Conclusions of law as of this date. Based thereon, it is hereby

ORDERED, that the transfer of the Debtor's interest in that certain note dated November 1, 1997, in the amount of \$72,000, between Connie L. Nuttal and Richard L. Nuttal as Maker and Haste, Inc., as Payee, to Harry Gounaris, is hereby avoided pursuant to 11 U.S.C. § 547, and the Debtor's interest is property of this bankruptcy estate, and it is further

ORDERED, and that the transfer of the Debtor's interest in that certain note dated November 1, 1997, in the amount of \$15,000, between Connie L. Nuttal and Richard L. Nuttal as Maker and Harry Gounaris and Steve Kallinikos as Payee, to Harry Gounaris, is hereby avoided pursuant to 11 U.S.C. § 547, and the Debtor's interest is property of this bankruptcy estate.

DATED this 25 day of July, 2002.



JUDITH A. BOULDEN
United States Bankruptcy Judge

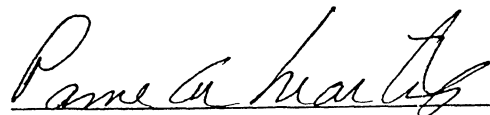
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Certificate of Mailing

I hereby certify that I mailed, postage prepaid, a copy of the forgoing **Judgment** to the following, on this 25 day of July, 2002.

Stephen W. Rupp
McKay, Burton & Thurman
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133
Attorneys for the Trustee

Nick J. Colessides
Attorney at Law
466 South 400 East #100
Salt Lake City, UT 84111-3325
Attorney for Defendant



Law Clerk

CERTIFICATE OF SERVICE

Filed **eight** copies of the foregoing, **one containing an original signature** with the Clerk of the Utah Court of Appeals:

OFFICE OF THE CLERK OF THE COURT
UTAH COURT OF APPEALS
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH
84114-0230

and served **two** copies of the foregoing upon each of the following:

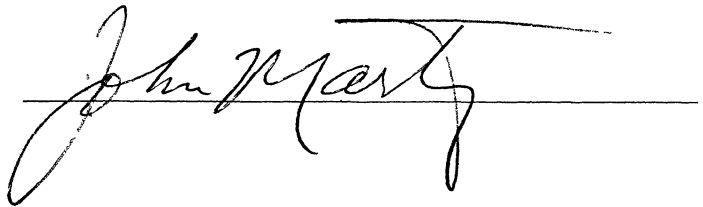
Attorney for Plaintiff-Appellee Jimmy Zufelt:

STEVEN F. ALLRED
Law Office of Steven F. Allred, P.C.
Troon Park, 585 S. State Street
Orem, Utah 85058

Trustee for the Bankruptcy Estate of Steve Kallinikos:

STEVEN W. RUPP
Trustee for the Bankruptcy Estate of Steve Kallinikos
McKay Burton & Thurman
170 South Main Street, Suite 800
Salt Lake City, Utah 84101

via first class mail, postage pre-paid, this 13th of April, 2005, addressed as set forth above.

A handwritten signature in cursive script, appearing to read "John M. Pary", is written over a horizontal line.