

SIGNED.



Dated: May 06, 2010

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)	Chapter 7
)	
WHISPERING WINDS PROPERTIES,)	CASE NO. 2:08-bk-15620-RJH
L.L.C.,)	
)	
Debtor.)	
_____)	
MAUREEN GAUGHAN, Trustee,)	ADVERSARY NO. 2:09-ap-01144-RJH
)	
Plaintiff,)	
)	
v.)	
)	
MERCHANTS T&F, INC., a New York)	MEMORANDUM DECISION
Corporation, WILLIAM E. MCKENNA,)	GRANTING TRUSTEE'S MOTION
a single man, and CYNTHIA WISE and)	FOR SUMMARY JUDGMENT
DAN WISE, husband and wife,)	
)	
Defendants.)	
_____)	

The threshold issue in this case is choice of law.

Federal courts in Arizona apply the conflicts of law principles of the forum district.¹ In the absence of contrary authority, Arizona courts follow the Restatement, and specifically the Restatement (Second) of Conflicts.²

In general Restatement Conflicts § 187 provides that the parties' express choice of law in a contract (in this case, New York) will control unless the particular issue before the court is one that the parties could not resolve by explicit agreement. Here, the Debtor, his wife

¹*In re Residential Resources*, 98 B.R. 2 (Bankr. D. Ariz. 1989).

²*Sprint Communications Co. L.P. v. Western Innovations, Inc.*, 618 F.Supp.2d 1101, 1109 (D. Ariz. 2009); *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 266, 77 P.3d 439, 441 (2003).

1 and Merchants were not capable of deciding amongst themselves what law should govern
2 whether a particular transfer of property is an avoidable preference under the Bankruptcy Code.

3 Application of New York’s tenancy by the entirety law is contrary to
4 fundamental policy of Arizona when the marital community is domiciled in Arizona. This
5 public policy is effectively declared by Arizona’s community property³ and quasi-community
6 property⁴ statutes, which declare the nature of the ownership interest in property acquired during
7 a marriage that is domiciled in Arizona, regardless of the law of the state where the property is
8 located. That quasi-community property “provision substitutes, for traditional choice of law
9 rules, the principle that all property acquired in other states should be treated upon dissolution as
10 if the property had been acquired in Arizona.”⁵

11 Arizona’s community property law is fundamental policy of Arizona governing
12 how property is held by a married couple and how it will be divided or distributed upon
13 dissolution of the marriage or death of one spouse.⁶ That fundamental Arizona policy rejects the
14 law of tenancy by the entirety,⁷ and declares all property acquired by either husband or wife
15 during marriage to be community property unless both parties expressly decide to take title in
16 some other fashion that is recognized by Arizona law, such as joint tenancy or community

18 ³A.R.S. § 25-211.

19 ⁴A.R.S. § 25-318(A).

20 ⁵*In re Furimsky*, 122 Ariz. 385, 389, 595 P.2d 177, 181 (Ariz. App. 1978), *rev’d on other*
21 *grounds*, 122 Ariz. 430, 595 P.2d 662 (1979). The quasi-community property statute was intended to
22 reverse the holding of *Rau v. Rau*, 6 Ariz. App. 362, 432 P.2d 910 (1967), which “adhered to the
23 traditional principle that property should be characterized as community or separate in accordance with
the law of the domicile of acquisition.” *Id.* at 388, 595 P.2d at 180.

24 ⁶In many respects, bankruptcy may be analogized to financial death. This parallel is probably
25 why the collection of assets and claims created by the filing of a bankruptcy case is called an “estate.”
26 Both probate jurisdiction and bankruptcy jurisdiction are effectively *in rem*, and consequently the forum
27 jurisdiction’s rulings have extraterritorial effect and bind all creditors and potential claimants even if
they were not subject to personal jurisdiction before that court. *See Tennessee Student Assistance Corp.*
v. Hood, 541 U.S. 440 (2004).

28 ⁷Tenancy by the entirety is “repugnant to the fundamental principles of our long-established
system of community property.” *Blackman v. Blackman*, 45 Ariz. 374, 388, 43 P.2d 1011, 1016 (1935).

1 property with right of survivorship.⁸ Arizona has a materially greater interest than New York in
2 a determination of this particular issue of how property is held by married couples domiciled
3 here, and therefore under Restatement § 188 Arizona is the state of applicable law.

4 Applying Arizona law, the Court therefore finds and concludes that the New York
5 property at issue was owned by Dan and Cynthia Wise as community property. Consequently
6 under Bankruptcy Code § 541(a)(2), all of Dan and Cynthia Wise’s legal and equitable interests
7 in property would become property of the estate even if only one of them filed a bankruptcy
8 case. Therefore the granting of a mortgage on that property within 90 days before such a
9 bankruptcy case, to secure an antecedent, unsecured debt, constitutes a transfer of an interest of
10 the Debtor in property that satisfies all of the elements of Bankruptcy Code § 547(b). This was
11 but a single transfer of a lien affecting all of Dan and Cynthia Wise’s community property
12 interests in the property; there were not two separate transfers of Dan Wise’s interest and
13 Cynthia Wise’s interest. And that single transfer of an interest affecting the entire community
14 property interest was a transfer by the Debtor, even though only one of them ever became a
15 debtor.

16 Because there was but a single transfer of a mortgage on the Debtor’s property,
17 that entire transfer is avoidable pursuant to Bankruptcy Code §§ 547(b) and 550(a). Pursuant to
18 Bankruptcy Code § 551, the mortgage lien that is avoidable is preserved for the benefit of the
19 estate and applies to all of the sale proceeds.

20 For these reasons, the Trustee’s motion for summary judgment is granted and
21 Merchant’s motion for summary judgment is denied. Counsel for the Trustee may upload an
22 appropriate form of judgment.

23 DATED AND SIGNED ABOVE

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⁸ *E.g.*, A.R.S. § 33-431(B) & (C).

1 Copy of the foregoing e-mailed
2 this 6th day of May, 2010, to:

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