

SIGNED.



Dated: December 10, 2009

James M. Marlar
JAMES M. MARLAR
Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:

BASHAS' INC.,
BASHAS' LEASECO INC.,
SPORTSMAN'S, LLC,

Debtors.

BASHAS' INC.; BASHAS LEASECO INC.;
and SPORTSMAN'S, LLC,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.; BANK OF
AMERICA, N.A.; COMPASS BANK; THE
PRUDENTIAL INSURANCE COMPANY OF
AMERICA; NORTHERN LIFE INSURANCE
COMPANY; HARTFORD LIFE INSURANCE
COMPANY; RELIASTAR LIFE INSURANCE
COMPANY; PRUCO LIFE INSURANCE
COMPANY; PRUDENTIAL RETIREMENT
INSURANCE AND ANNUITY COMPANY;
and UNITED OF OMAHA LIFE INSURANCE
COMPANY,

Defendants.

Chapter 11

Nos. 2:09-bk-16050-JMM
2:09-bk-16051-JMM
2:09-bk-16052-JMM
(Jointly Administered)

Adversary No. 2:09-ap-01309-JMM

MEMORANDUM DECISION

Before the court are motions to dismiss counts under 11 U.S.C. § 547 (preference), § 548 (fraudulent conveyance) and § 550 (remedies) filed by Wells Fargo Bank, N.A. (DN 5) and The Prudential Insurance Company of America, Hartford Life Insurance Company, ReliaStar Life Insurance Company, United of Omaha Life Insurance Company, Pruco Life Insurance Company,

1 Prudential Retirement Insurance and Annuity Company, PRUCO Life Insurance Company of New
2 Jersey, and Universal Prudential Arizona Reinsurance Company (collectively, the “Note Holders”)
3 (DN 9). The facts relied on by the court are not in dispute, and therefore the matters are treated as
4 for summary judgment.

5
6 **Bashas' Inc., Bashas' Leaseco, Inc., Sportsman's, LLC:**

7 **Section 548 - Fraudulent Transfer**

8
9 The court will GRANT Wells Fargo's and the Note Holders' motions on this count.
10 Reasonably equivalent value was given in consideration of security interests being granted by the
11 Debtor entities. *In re Anand*, 210 B.R. 456 (Bankr. N.D. Ill. 1997); *aff'd* 239 B.R. 511 (N.D. Ill.
12 1999). On the record before the court, nothing was conveyed away by the Debtors for which they
13 did not receive value. Section 548(a)(B)(i). Nor was the Debtor, Bashas' Inc., insolvent on the date
14 of the grants of the security interests, or the recording thereof. Bashas' Inc. was not "on its
15 deathbed," and was then and is still now a going concern, and has indicated that it intends to propose
16 a one-hundred percent plan and stay in business. So far, it has shown no inclination towards
17 liquidation. Its schedules, filed under oath, reflect assets of \$386 million, and liabilities of \$271
18 million. Bashas' Inc. was not insolvent on the date of filing, nor was it insolvent 90 days preceding
19 bankruptcy, and gives no indication that it is insolvent today (no amended schedules are on file to
20 so indicate). The Debtors are bound, by judicial estoppel, to the statements made under oath in their
21 schedules, that their condition was a positive \$100,000 million on the filing date, or was any
22 different in the 90 days before filing. *In re Hamilton*, 270 F.3d 778 (9th Cir. 2002).

23
24 **Bashas' Inc.: Section 547 - Preference**

25
26 By the same analysis, the only disputed basis, for contesting the recordation of the
27 security interests, is the contention that Bashas' Inc. was insolvent at the time. Bashas' schedules
28 belie that statement. It cannot change its valuations, made under oath, to attempt to carry the day

1 on a preference claim. It is bound by its schedules, as it is still a going and operating concern.
2 Being unable to prove an insolvency claim, the § 547 count fails. *See In re DAK Industries*, 195
3 B.R. 117 (Bankr. C.D. Cal. 1996), *aff'd*, 170 F.3d 1197 (9th Cir. 1999). Wells Fargo's and the Note
4 Holders' motions to dismiss this § 547 count by Bashas' Inc. will be GRANTED.

5
6 **Sportsman's LLC and Bashas' Leaseco, Inc.**
7

8 As for Sportsman's, LLC and Bashas' Leaseco, Inc., these Debtors noted insolvency
9 status on their schedules. Therefore, the § 547 issues survive motions to dismiss, but the § 548
10 count fails. The complaint states a sufficient cause of action to proceed to the next step. Wells
11 Fargo's and the Note Holders' motions to dismiss (1) the § 547 count by Sportsman's LLC and
12 Bashas' Leaseco, Inc. will be DENIED, but GRANTED as to Bashas', Inc., and (2) the § 548 count
13 by Bashas' Inc., Sportsman's LLC and Bashas' Leaseco, Inc. will be GRANTED.

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15 DATED AND SIGNED ABOVE.

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17 COPIES to be sent by the Bankruptcy Notification
18 Center ("BNC") to the following:

19 All parties to this adversary proceeding
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