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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	NC-17-1186-BSTa
)		
CRESTA TECHNOLOGY CORPORATION,)	Bk. No.	16-50808-MEH
)		
Debtor.)	Adv. No.	17-05030-MEH
_____)		
MATTHEW LEWIS,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
DORIS A. KAELIN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Submitted Without Argument on January 25, 2018

Filed - April 6, 2018

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding

Appearances: _____
Appellant Matthew Lewis, pro se on brief; Gregg S. Kleiner of Rincon Law LLP on brief for appellee, Doris A. Kaelin, Chapter 7 Trustee.

Before: BRAND, SPRAKER and TAYLOR, Bankruptcy Judges.

1 BRAND, Bankruptcy Judge:

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3 This case brings to mind the adage: "No good deed goes
4 unpunished." Appellant Matthew Lewis appeals a judgment under
5 §§ 549(a)¹ and 550(a)(1) avoiding a postpetition transfer of
6 \$10,000 as reimbursement for payment of the debtor's legal fees
7 and ordering recovery of the funds from Lewis. The issue before
8 the bankruptcy court was whether an ordinary check delivered to
9 the creditor prepetition, but honored postpetition, was
10 transferred on the date of delivery or honor for purposes of
11 § 549(a). Relying on Barnhill v. Johnson, 503 U.S. 393 (1992),
12 the bankruptcy court determined that the payment was transferred
13 when the check was honored by the debtor's bank.

14 This is an issue of first impression before any appellate
15 court in the Ninth Circuit since Barnhill. We agree with the
16 bankruptcy court, and we AFFIRM.

17 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

18 **A. The check**

19 On March 16, 2016, Lewis, in his role as Chief Financial
20 Officer of the debtor, Cresta Technology Corp. ("Cresta"), issued
21 a check from Cresta's bank account to Patrick Castello, Cresta's
22 bankruptcy attorney, as payment for representing Cresta in its
23 bankruptcy case. Castello refused the check in favor of a
24 cashier's check.

25 On March 17, 2016, Lewis delivered to Castello a cashier's
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27 ¹ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 check drawn on Lewis's personal bank account for Cresta's legal
2 fees, with the agreement that Cresta would reimburse Lewis.

3 On March 18, 2016, Cresta (via Lewis as CFO) issued a check
4 for \$10,000 ("Check") to Lewis from Cresta's bank account. Later
5 that same day, Cresta filed its chapter 7 bankruptcy petition,
6 signed by Lewis. Doris Kaelin was appointed as the chapter 7
7 trustee.

8 The Check cleared Cresta's bank account on March 22, 2016,
9 four days after the petition date.

10 **B. The adversary proceeding against Lewis**

11 Trustee filed a complaint against Lewis, seeking to avoid the
12 \$10,000 payment as a postpetition transfer under § 549(a) and to
13 recover the funds for the benefit of the estate under § 550(a)(1).

14 On summary judgment, Trustee argued that a "transfer" by an
15 ordinary check for purposes of § 549 occurs when the check clears
16 the debtor's bank account, not when it is delivered to the
17 creditor. She relied on Barnhill, 503 U.S. at 394-95 and Mora v.
18 Vasquez (In re Mora), 199 F.3d 1024, 1027 (9th Cir. 1999).² In
19 contrast, Lewis argued that § 547 applied here, not § 549. In
20 cases of check payments for purposes of § 547(c)(1), Lewis argued,
21 the "date of delivery" governs when a transfer occurs. Because he
22 received the Check prepetition and it was a contemporaneous

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24 ² Mora did not address this precise issue. The issue there
25 was whether, under § 549(a), a transfer of an interest in a
26 cashier's check occurs at the time the check is mailed. 199 F.3d
27 at 1025. Applying the rationale of Barnhill, the Ninth Circuit
28 Court of Appeals held that the act of "mailing" did not constitute
"delivery" for purposes of effectuating a transfer under § 549(a);
delivery does not occur until the cashier's check is in the
physical possession and control of the payee. In re Mora, 199 at
1027.

1 exchange of new value between him and Cresta, Lewis asserted that
2 the Check was not an avoidable postpetition transfer under
3 § 549(a) but rather a non-avoidable preference under § 547(c) (1).

4 After a hearing, the bankruptcy court granted Trustee summary
5 judgment, determining that the "transfer" to Lewis occurred on
6 March 22, 2016 – the date the Check was honored by Cresta's bank.
7 Therefore, because the Check was transferred postpetition without
8 authorization from the court or the Code, it was an avoidable
9 postpetition transfer under § 549(a) recoverable by the estate.
10 The court entered a money judgment against Lewis and in favor of
11 Trustee for \$10,000 plus costs. Lewis timely appealed.

12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
14 and 157(b) (2) (H). Because the judgment resolved all claims
15 asserted in the complaint, it was a final appealable order.
16 Therefore, we have jurisdiction under 28 U.S.C. § 158.

17 **III. ISSUES**

- 18 1. Did the bankruptcy court err in determining that § 549
19 applied to the Check and not § 547? And did it err in determining
20 that the "date of honor" rule applied?
21 2. Did the bankruptcy court err in granting Trustee summary
22 judgment?

23 **IV. STANDARDS OF REVIEW**

24 We review de novo the bankruptcy court's summary judgment
25 ruling. Ulrich v. Schian Walker, P.L.C. (In re Boates), 551 B.R.
26 428, 433 (9th Cir. BAP 2016). The determination of when an
27 avoidable postpetition transfer of estate property occurs is a
28 question of law also reviewed de novo. In re Mora, 199 F.3d at

1 1026 (citing Barnhill, 503 U.S. at 397).

2 When we review a matter de novo, we give no deference to the
3 bankruptcy court's ruling. In re Boates, 551 B.R. at 433.

4 **V. DISCUSSION**

5 **A. The bankruptcy court did not err by applying § 549(a) to the**
6 **Check and determining that the date of honor rule applied.**

7 Lewis contends that the bankruptcy court committed reversible
8 error because it applied § 549 and not § 547. Precisely, he
9 argues that, because the Check was delivered prepetition,
10 § 549(a)³ is inapplicable, and the court should have applied the
11 affirmative defenses available for a preferential transfer under
12 § 547(c).

13 Section 547(b) permits a bankruptcy trustee to recover
14 preferential payments from a debtor to a creditor made within the
15 ninety days preceding the filing of the bankruptcy. Section
16 547(c) establishes various exceptions, or affirmative defenses, to
17 § 547(b)'s general rule. For example, § 547(c)(1) provides an
18 exception for transfers that are part of a contemporaneous
19 exchange for new value between a debtor and creditor. Section
20 547(c)(1) provides that the trustee may not avoid a transfer to
21 the extent the transfer was: (A) intended by the debtor and the
22 creditor to or for whose benefit such transfer was made to be a
23 contemporaneous exchange for new value given to the debtor; and
24 (B) in fact was a substantially contemporaneous exchange. This is

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27 ³ For purposes here, § 549(a) provides that the trustee may
28 avoid a transfer of property of the estate that occurs after the
commencement of the case and that is not authorized under the Code
or by the court. § 549(a)(1), (a)(2)(B).

1 the defense Lewis asks us to apply here.⁴

2 In Barnhill, the United States Supreme Court held that under
3 § 547(b) the "transfer" of an ordinary check does not occur until
4 the check is honored by the debtor's bank. 503 U.S. at 394-95.
5 Barnhill overruled Ninth Circuit law, which held that for purposes
6 of § 547(b) a "transfer" occurs at the time an ordinary check is
7 delivered to the creditor, not on the date the check is honored.
8 See Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.),
9 797 F.2d 790, 791 (9th Cir. 1986), abrogated by Barnhill, supra.
10 The Ninth Circuit has since followed the holding of Barnhill. See
11 MBNA Am. v. Locke (In re Greene), 223 F.3d 1064, 1067 n.3 (9th
12 Cir. 2000) (a "transfer" for purposes of § 547(b) occurs when the
13 check is honored by the debtor's bank).

14 Without deciding the issue, Barnhill expressly noted that, in
15 the context of the affirmative defenses available under § 547(c),
16 the Courts of Appeals that have considered the issue were
17 unanimous in concluding that a "date of delivery" rule should
18 apply to ordinary check payments for purposes of § 547(c). 503
19 U.S. at 402 n.9. That was, and still appears to be, the rule in
20 the Ninth Circuit. See Kupetz v. Elaine Monroe Assocs., Inc. (In
21 re Wolf & Vine), 825 F.2d 197, 200-202 (9th Cir. 1987) (for
22 purposes of determining a contemporaneous exchange, a transfer
23 made by check is deemed to occur at the time of delivery as long
24 as it is presented for payment within a reasonable time); Shamrock
25 Golf Co. v. Richcraft, Inc., 680 F.2d 645, 646 (9th Cir. 1982);
26 Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed

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28 ⁴ It is undisputed that Lewis was a creditor of the estate.

1 Co.), 30 B.R. 551, 553 (9th Cir. BAP 1983).

2 Lewis improperly conflates the affirmative defenses available
3 under § 547(c) with § 549(a), which has its own exceptions for
4 postpetition transfers. See § 549(b), (c). In preference cases
5 under § 547, the events constituting the transfer between the
6 debtor and creditor were completed **prior** to the bankruptcy filing.
7 In other words, as relevant here, both the delivery and honoring
8 of the check occurred **prepetition**. The only question remaining in
9 such a case is whether the ordinary check was honored within the
10 90-day (or in the case of an insider, one year) reach-back period.
11 That is not this case.

12 Here, the transaction between Cresta and Lewis straddles the
13 date of the commencement of the case. Lewis received the Check
14 prepetition, but it was honored postpetition. See In re Plaza
15 Hotel Corp., 111 B.R. 882, 887 (Bankr. E.D. Cal. 1990) (noting
16 that a bankruptcy filing before a check is honored is very
17 different from a transaction in which the payment was actually
18 completed prepetition; in the former case, the transaction is
19 incomplete for not having been paid due to the account now
20 belonging to the estate). Thus, neither § 547(b) nor the
21 affirmative defenses available under § 547(c) apply.

22 Section 549(a) permits the trustee to avoid a postpetition
23 transfer of estate property, and § 550(a)(1) permits the trustee
24 to recover the amount of the avoidable transfer from the initial
25 transferee. To recover under § 549, the trustee must show that
26 the postpetition transfer occurred after the filing of the
27 bankruptcy petition and that the transfer was not authorized by
28 either the bankruptcy court or the Code. § 549(a); In re Mora,

1 199 F.3d at 1026.

2 The question, then, is whether the transfer from Cresta to
3 Lewis occurred before or after the bankruptcy petition was filed.
4 That answer turns on whether the "transfer" of an ordinary check
5 occurs on the "date of delivery" or "date of honor" for purposes
6 of § 549(a).

7 In cases where an ordinary check was delivered prepetition
8 but honored by debtor's bank postpetition, several courts, post-
9 Barnhill, have determined that the pertinent date for "transfer"
10 is the date the check was honored. See Guinn v. Oakwood Props.,
11 Inc. (In re Oakwood Mkts., Inc.), 203 F.3d 406, 409 (6th Cir.
12 2000) (the only circuit court to address this issue after
13 Barnhill)⁵; Cont'l Mfg. Co. v. Sommers (In re Contractor Tech.,
14 Ltd.), 2006 WL 1118039, at *2 (S.D. Tex. Apr. 26, 2006); Wittman
15 v. State Farm Life Ins. Co. (In re Mills), 176 B.R. 924, 927 (D.
16 Kan. 1994); Sommers v. Katy Steel Co. (In re Contractor Tech.,
17 Ltd.), 343 B.R. 573, 577-79 (Bankr. S.D. Tex. 2006); In re
18 Dybalski, 316 B.R. 312, 316 (Bankr. S.D. Ind. 2004); Spear v. CEMA
19 Distrib. (In re Rainbow Music, Inc.), 154 B.R. 559, 561 (Bankr.
20 N.D. Cal. 1993). See also 5 Collier on Bankruptcy ¶ 549.04[2]
21 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2012). We
22 could not locate any authority to the contrary.

23 These courts agree that Barnhill's holding was not limited to
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25 ⁵ Although the Sixth Circuit in Oakwood Markets expressly
26 stated that Barnhill was not controlling, it held that "adoption
27 of the date of honor rule in the context of 11 U.S.C. § 549(a) is
28 appropriate because this rule encourages the prompt submission of
checks to the bank, and provides a date certain upon which parties
to the transfer can rely and upon which courts can base a ruling
in the event of litigation." 203 F.3d at 409.

1 § 547, given its application of the definition of "transfer" found
2 in § 101(54)⁶ and ruling that "[f]or purposes of payment by
3 ordinary check, therefore, a 'transfer' as defined by § 101(54)
4 occurs on the date of honor, and not before." 503 U.S. at 400.
5 The definitions in § 101 apply to all provisions of the Code, not
6 just § 547(b). See § 101 ("In this title the following
7 definitions shall apply"). See also In re Plaza Hotel Corp., 111
8 B.R. at 887 (checks that straddle the filing of the case – i.e., a
9 check that is delivered prepetition and honored postpetition – can
10 be recovered by the trustee from the payee as an unauthorized
11 postpetition transfer).

12 Prior to Barnhill, we held that a transfer by ordinary check
13 occurs on the "date of delivery" for purposes of § 549. See
14 Tarver v. Trois Etoiles, Inc. (In re Trois Etoiles, Inc.), 78 B.R.
15 237, 239 (9th Cir. BAP 1987) (prepetition tender of check to
16 debtor's bankruptcy attorney for legal fees honored postpetition).
17 In so holding, we noted:

18 Although Shamrock Golf and its Ninth Circuit progeny
19 involved interpretations of 'transfer' under Section 547,
20 we find no reason to alter this Circuit's definition of
21 'transfer' merely because the present case involves
22 Section 549. **In the interests of uniformity and
consistency**, we hold that a transfer by check occurs when
the check is received by the payee for purposes of Section
549.

23 Id. (emphasis added).

24 We conclude that our holding in Trois Etoiles has been
25 effectively overruled by the Supreme Court in Barnhill and is no

27 ⁶ Section 101(54) (D) defines "transfer" to include any mode,
28 "of disposing of or parting with (i) property or (ii) an interest
in property."

1 longer controlling precedent. See United States v. Lancellotti,
2 761 F.2d 1363, 1366 (9th Cir. 1985) ("When an intervening Supreme
3 Court decision undermines an existing precedent of the [Panel],
4 and both cases are closely on point, a three judge panel of this
5 court may reexamine our precedent to determine its continuing
6 authority"). See also In re Rainbow Music, Inc., 154 B.R. at 561
7 (determining that Barnhill overruled Trois Etoiles's transfer-on-
8 receipt rule for avoidance actions under § 549).

9 At the time of Trois Etoiles, the "date of delivery" rule
10 controlled for § 547(b) in the Ninth Circuit. It is clear that
11 the Panel felt compelled to adopt the date of delivery rule for
12 § 549(a) in order for the two sections to be consistent with each
13 other, thereby facilitating the trustee's ability to recover
14 transfers under either section and supporting the Code's general
15 policy of equal distribution among creditors. To have held
16 otherwise would have created a period wherein transfers would be
17 unrecoverable. After Barnhill, however, the "date of delivery"
18 rule is no longer the law in this circuit with respect to
19 preferential transfers by ordinary check under § 547(b).

20 In reaching its decision in Barnhill, the Supreme Court
21 reasoned that the debtor does not dispose of or part with the
22 funds subject to the check until the creditor cashes it, because:
23 "receipt of a check gives the recipient no right in the funds held
24 by the bank on the drawer's account. Myriad events can intervene
25 between delivery and presentment of the check that would result in
26 the check being dishonored." 503 U.S. at 399. Consequently, an
27 ordinary check does not transfer property of the estate until the
28 check is honored. Id.

1 We are persuaded by the other courts that have addressed this
2 issue post-Barnhill; the Supreme Court's rationale for when a
3 transfer occurs in the case of an ordinary check under § 547
4 applies with equal force to postpetition transfers under § 549.
5 See also In re Mora, 199 F.3d at 1027 n.5 (not addressing this
6 precise issue but reasoning that, under Barnhill, the term
7 "transfer" under § 547(b) is analogous to § 549(a), and therefore
8 case law analyzing one is applicable to analysis under the other).
9 We see no logical reason, and Lewis articulates none, for not
10 using the same test to determine the date of transfer for purposes
11 of both statutes.

12 As courts have recognized, to apply the "date of honor" rule
13 to preferences and the "date of delivery" rule to postpetition
14 transfers creates a safe harbor for certain transfers by check.
15 Ordinary checks delivered prepetition but honored postpetition
16 would be recoverable neither as a preference nor as a postpetition
17 transfer. See In re Mills, 176 B.R. at 927; In re Rainbow Music,
18 Inc., 154 B.R. at 561-62. That is not a result Congress could
19 have intended.

20 **B. The bankruptcy court did not err by granting Trustee summary**
21 **judgment.**

22 Summary judgment is properly granted when no genuine issues
23 of disputed material fact remain, and, when viewing the evidence
24 most favorably to the non-moving party, the movant is entitled to
25 prevail as a matter of law. Fed. R. Civ. P. 56 (applicable in
26 adversary proceedings by Rule 7056); Celotex Corp. v. Catrett, 477
27 U.S. 317, 322-23 (1986). Material facts are those that may affect
28 the outcome of the case under applicable substantive law.

1 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And
2 issues are genuine only if the trier of fact reasonably could find
3 in favor of the nonmoving party on the evidence presented. Far
4 Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001)
5 (citing Anderson, 477 U.S. at 248-49).

6 Here, the undisputed facts established that the Check was
7 honored postpetition on March 22, 2016, and that the payment made
8 by the Check was not authorized by the Code or the bankruptcy
9 court. Lewis articulated no defenses available under § 549(b) or
10 (c); they would not apply in any event. The undisputed facts
11 established the necessary elements for an avoidable postpetition
12 transfer under § 549. Because there were no genuine issues of
13 material fact in dispute, Trustee was entitled to judgment as a
14 matter of law. Accordingly, the bankruptcy court did not err in
15 granting her summary judgment and ordering recovery of the \$10,000
16 (plus costs) from Lewis.

17 **VI. CONCLUSION**

18 For the foregoing reasons, we AFFIRM.⁷

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27 ⁷ Lewis does not contest the bankruptcy court's ruling under
28 § 502(d) that his \$19,000 claim be disallowed until the judgment
is paid to Trustee. Therefore, we do not address this issue.