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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

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In re)	Chapter 7 proceedings
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JAMES P. PULITO)	Case No. 2-05-bk-13557-CGC
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Debtor.)	UNDER ADVISEMENT DECISION RE
)	LISA WARD NOTE CLAIM
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I. Introduction

The Debtor and Ms. Ward have had an on-again-off-again relationship, professionally and personally, over the past 15 years. The Debtor served as Ms. Ward’s attorney both formally and informally several times since the early 1990s. The parties have been engaged twice; once in 2000 and again in 2002. They married in 2002 and divorced by 2005.

The issue before the Court is the validity of a \$400,000 proof of claim filed by Ms. Ward that is based on a \$400,000 promissory note dated July 2, 2002 signed by the Debtor (“Note”). Citing a lack of consideration, the Trustee objected to the proof of claim. After being substituted as party in interest, the Debtor adopted the position of the Trustee. Ms. Ward claims that consideration exists because the Note was given: 1) in lieu of a prenuptial agreement; 2) as an inducement to marry; and 3) as a settlement of potential legal claims against the Debtor.

Central to the dispute is how and if the Note was delivered. Ms. Ward claims that it was delivered to her at her office, while the Debtor claims that it was never delivered and instead was stolen from his office. A trial was held and the matter was taken under advisement.¹

¹This memorandum decision represents the Court’s findings of fact and conclusions of law as required under Fed. R. B. Proc. 7052.

1 **II. Facts**

2 *A. Professional Relationship*

3 Debtor is an attorney who has been suspended from the practice of law since 2003. In the
4 early 1990s the Debtor represented Ms. Ward in her divorce proceedings from her then husband,
5 William Curtis, whom she divorced in 1995. Debtor claims that he was forced to take over
6 representation of Ms. Ward after a fee dispute arose with her former attorney. The quality of the
7 representation is disputed. Ms Ward argues that the Debtor gave her ineffective representation by
8 not securing sufficient spousal maintenance. Debtor counters that, under the circumstances, he gave
9 effective representation because Ms. Ward’s primary goal was to punish Mr. Curtis.

10 As a result of the divorce, Ms. Ward received spousal maintenance - how much and for how
11 long is disputed. Ms. Ward claims lifetime spousal support of \$2,000 per month. Based on a
12 mathematical formula, the Debtor claims that the spousal support was significantly less and would
13 have ceased by October 2003.

14 In addition to her divorce proceedings, the Debtor also represented Ms. Ward in disability
15 proceedings in Summer 2002.

16 *B. Personal Relationship*

17 Debtor and Ms. Ward began a pattern of on-again-off-again dating in the mid-1990s.
18 Ultimately, they were engaged in July 2000; however, the engagement broke off soon afterward.
19 They began dating again around the time the Debtor assisted Ms. Ward in her disability proceedings
20 in Summer, 2002, marrying soon after in October 2002. The testimony of the parties did not clarify
21 when exactly the relationship again became romantic, but according to Ms. Ward the parties were
22 engaged by late August or early September 2002.

23 Debtor and Ms. Ward divorced in January 2005. In connection with the divorce, both parties
24 signed an “Agreement” under which both parties agreed that the following claims of Ms. Ward
25 survived the entry of the dissolution decree (“Dissolution Agreement”):

- 26 ● Liability under the Note;

- Liability under an agreement dated July 23, 2003 to compensate Jessica and Brandon Curtis regarding a loss of stock earnings;
- Liability resulting from Debtor's assistance to Ms. Ward in her divorce from Mr. Curtis resulting from acts of negligence, legal malpractice or breach of fiduciary duty which may result in compensatory and punitive damages; and
- Liability resulting from the information provided in filling out FAFSA forms.

C. The Note & Associated Documents

The Note is the central document in this matter. It is undisputed that Ms. Ward possesses the Note; it is signed by the Debtor; and it is in the amount of \$400,000. The parties agree on little else regarding the Note.

Notwithstanding Ms. Ward's possession of the Note, the Debtor claims that he did not deliver it. According to the Debtor, he used the Note as a "visual aid" during a July 2, 2002 face-to-face meeting in a restaurant at the Chinese Cultural Center, after which he took it back to either his home or law office. The Debtor alleges that sometime after the parties were married, Ms. Ward removed the Note from one of his offices without his knowledge or consent. Ms. Ward flatly denies this allegation.

Ms. Ward claims that the Debtor delivered the Note to her office at the City of Phoenix in an envelope along with other documents. According to her testimony, the Debtor caused her poor financial condition by his inadequate representation in her divorce from Mr. Curtis. Ms. Ward claims that the Debtor gave the Note to atone for his broken engagement and as a replacement for a prenuptial agreement.

According to Ms. Ward, included in the envelope delivered to her office was: 1) a signed "Apology" dated June 28, 2002 ("Apology"); 2) a map of Debtor's property in Cave Creek; 3) a signed "Written Assurance" dated July 2, 2002 ("Assurance"); 4) an unsigned "Draft 7.02.02" ("Draft"); and 5) the Note. The Debtor does not know how Ms. Ward obtained these documents, but denies that they were delivered to her Phoenix office. Ms. Ward uses each of these documents

1 to show the consideration she exchanged for the Note.

2 The Apology is signed by the Debtor. It expresses a desire to make amends for his earlier
3 actions and acknowledges that the Debtor owes “for my actions and am attempting to pay.”

4 The map is a drawing of Debtor’s Cave Creek property which he was attempting to shield
5 from former clients named Guenther who had sued him for malpractice..

6 The Assurance is also signed by the Debtor. In it the Debtor states that Ms. Ward “shared
7 with me that her physical condition is deteriorating to the point where continued employment at her
8 current position (and likely any position) will seriously impact her future quality of life.” He also
9 offers to provide a “financial safety net to assure her family’s economic survival in the future” and
10 acknowledges that due to his past actions she is skeptical of his promises. The Assurance lays out
11 his entanglement with the Guenthers, stating that he is liable to them for damages; therefore the
12 Debtor wants to avoid a claim for fraudulent transfer against Ms. Ward. Because of the
13 entanglement, the Debtor considered preparing documentation detailing Ms. Ward’s claim against
14 him - including a lawyer’s demand letter to the Debtor and his acknowledgment of liability –
15 however, this was only presented as a possibility. As stated in the Assurance, the Debtor provided
16 the Note until a “workable game plan is in place and final documentation prepared and executed.”

17 Detailing actions leading up to the break off of the 2000 engagement, the unsigned Draft lists
18 potential claims against the Debtor. The potential causes of action include fraud in the inducement
19 and breach of a promise to marry. The damages listed are losses from monetary decisions, mental
20 pain and suffering, aggravation of preexisting condition, lost social opportunity, and lost prime
21 years. The Draft states that the Debtor’s sole asset is his property in Cave Creek worth \$700,000.
22 Again, the lawsuit between the Guenthers and the Debtor is mentioned as obstacle to Ms. Ward
23 maximizing her damages and as a potential threat to her retaining any money transferred.

24 With these facts as a backdrop, the Debtor filed for bankruptcy in 2005 to prevent a sheriff’s
25 sale by the Guenthers.

1 **III. Position of the Parties**

2 The Debtor claims that no consideration was given for the Note because there was never an
3 exchange of promises regarding the Note. According to the Debtor, when the Note was presented
4 at the Chinese Cultural Center, there was no pending marriage, therefore consideration for marriage
5 could not exist. Further, argues the Debtor, Ms. Ward overstates her spousal maintenance, which
6 would have expired in 2004, by almost \$1900 per month.

7 Ms. Ward claims the Debtor gave consideration for the Note. According to Ms. Ward, she
8 gave up lifetime spousal maintenance, \$333 a month at the time, when she married the Debtor. Ms.
9 Ward feels that the Note was given in exchange for her giving up a claim for attorneys fees; atoning
10 for a previous engagement; losses due to advice concerning a stock sale; her emotional turmoil; to
11 compensate for her various medical issues; and according to the pretrial statement Ms. Ward alleges
12 that the note was given in lieu of a prenuptial agreement and/or as an inducement to marry.

13 **IV. Analysis**

14 In sum, Ms. Ward’s claim is based off of two possible scenarios. The Note was given as a:
15 1) prenuptial agreement and/or inducement to marry; and 2) a settlement of various claims.

16 *A. Burden of Proof for a Proof of Claim*

17 This matter turns on which party has satisfied his or her burden of proof. Under
18 Fed.R.Bankr.P. Rule 3001(f), filing a proof of claim is *prima facie* evidence of the validity and
19 amount of the claim. However, the rule does not address the burden of proof after an objection has
20 been filed. *In re Garvida*, 347 B.R. 697, 706 (9th Cir. BAP 2006) (citing to *Raleigh v. Ill. Dep't of*
21 *Revenue*, 530 U.S. 15, 22 n. 2, (2000)). Instead, Rule 3001 “operates merely as an evidentiary
22 presumption that is rebuttable.” *In re Garvida* at 706. Once the presumption is overcome, the
23 burden shifts to the creditor. Editor's Comment to Rule 3001(f), *Norton Bankruptcy Rules*
24 (2008-2009 ed.).

25 *B. Premarital Agreement*

26 In Arizona, “[p]remarital agreement’ means an agreement between prospective spouses that
27 is made in contemplation of marriage and that is effective on marriage.” A.R.S. §25-201(1). Here,
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1 Ms. Ward claims that Debtor gave her the Note instead of a formal prenuptial agreement. In other
2 words, it was given in contemplation of marriage and would only be effective upon marriage, thus
3 meeting the statutory definition. Ms. Ward's other formulation is that Debtor gave her the Note as
4 an inducement to marry. Presumably, this means that the note would only be effective upon
5 marriage-- *i.e.* if you marry me I will give you the Note, a construction that also would meet the
6 statutory definition. Regardless of its label, under Ms. Ward's first theory of recovery, the Note
7 must qualify as a premarital agreement.

8 Under 11 U.S.C. §502(b)(1), a claim is disallowed if it is "unenforceable against the debtor
9 and property of the debtor, under any agreement or applicable law." To prevail on her first theory
10 of recovery, Ms. Ward must prove that the Note is enforceable as a premarital agreement. As noted,
11 Arizona statutes control the validity of premarital agreements. A "[p]remarital agreement must be
12 in writing and signed by both parties. The agreement is enforceable without consideration." A.R.S.
13 §25-202(A). If the Note is a premarital agreement, it is enforceable without consideration.
14 However, because only the Debtor signed the Note and associated documents, they are
15 unenforceable as a premarital agreement as a matter of law. *See Shallenberger v. Shallenberger*,
16 2009 WL 223138 (Ariz.App.Div.1 January 29, 2009) (upholding a lower court decision refusing to
17 enforce a prenuptial agreement because it was not in writing and signed by both parties) (not
18 reported in P.3d). Therefore, Ms. Ward's first theory of recovery does not satisfy Section 502(b)(1).

19 *C. Settlement of Past Claims*

20 "Sophisticated business people are held to a stringent standard with respect to defenses to
21 a negotiable instrument." 10 CJS BillsNotes §288. The Note is a negotiable instrument. The Debtor,
22 an experienced business attorney, will be held to the standard.

23 The Debtor claims that the Note is unenforceable because it was not delivered; instead Ms.
24 Ward stole it from his office. If correct, the Note is unenforceable because an instrument is
25 enforceable only if it is voluntarily transferred. A.R.S. § 47-1201. However,

26 Where signatures are admitted or proved, and the holder produces the instrument,
27 and the defendant asserts the defense of nondelivery, the defendant has the burden
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1 of proving such defense ... Where an instrument is no longer in the possession of the
2 maker, it is presumed to have been effectively delivered until the contrary is proved.
3 10 C.J.S. Bills and Notes §316. Here, the Debtor has not met his burden of proof. There are
4 competing stories regarding delivery. The Court does not know who is telling the truth, but because
5 Ms. Ward possesses the Note, delivery is presumed. The Debtor must show nondelivery. Because
6 he has not done so, the Court concludes that the Debtor delivered Note to Ms. Ward.

7 Regardless of delivery, the Debtor claims that he did not give the Note as settlement for past
8 claims; therefore, the Note lacks consideration. However, every contract in writing imports
9 consideration. A.R.S. §44-121. Further, “[t]he burden of showing a lack of or failure of
10 consideration is upon the party attacking it.” *Lessner v. Dental Laboratories, Inc. v. Kidney*, 16
11 Ariz.App. 159, 160, 492 P.2d 39, 40 (1971) (citing *Hitching Post Lodge, Inc. v. Kerwin*, 101 Ariz.
12 402, 420 P.2d 273 (1966); *Brand v. Elledge*, 101 Ariz. 352, 419 P.2d 531 (1966); *Dunlap v. Fort*
13 *Mohave Farms, Inc.*, 89 Ariz. 387, 363 P.2d 194 (1961); *Chernov v. Sandell*, 68 Ariz. 327, 206 P.2d
14 348 (1949). Further, by admitting he signed the Note, the Debtor bears the burden of proving his
15 defenses because when the signature on a note is admitted a plaintiff is entitled to payment of the
16 note, “unless the defendant proves a defense.” A.R.S. § 47-3308(B).

17 The Debtor must prove that there was no consideration for the settlement of past claims. The
18 lack of consideration is found in the Dissolution Agreement. By signing the Dissolution Agreement,
19 Ms. Ward retained her claims against the Debtor regarding his past legal representation and
20 compensation for lost stock profits. If consideration was given via the Note, then these claims
21 should no longer exist. When viewed as a whole, the evidence is that the Note was not given as
22 settlement of past claims, but was intended, at best, as a premarital agreement (and that claim fails
23 for the reasons stated above). Ms. Ward’s second theory fails because the Debtor has met his burden
24 of proof on lack of consideration.

24 **V. Conclusion**

25 For the foregoing reasons, the proof of claim will be disallowed. Debtor is to submit a
26 simple form of final order.

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DATED: March 9, 2009


CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

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