

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:  
KEY DEVELOPERS GROUP, LLC.,  
Debtor.

CHAPTER 11  
CASE NO. 8:08-bk-2929-MGW

\_\_\_\_\_/

PHILIP VON KAHLE,  
Liquidating Trustee,  
Plaintiff,

vs.

Adv. No. 8:09-ap-00419-MGW

STUDIO MARC INTERNATIONAL, INC.,  
a Florida corporation,  
Defendant.

\_\_\_\_\_/

J.B. Vol 16 #2283

**FINAL JUDGMENT**

THIS ADVERSARY PROCEEDING came on for a final evidentiary hearing on July 11, 2011 at 9:30 a.m. and for recitation of the Court's ruling on August 16, 2011 at 3:00 p.m. This Court, having reviewed the pleadings and stipulations of the parties; having considered the testimonial and documentary evidence introduced by the Plaintiff, Philip von Kahle, as Liquidating Trustee (the "Trustee") and by the Defendant, Studio Marc International, Inc. ("SMI") and received by this Court; having considered the argument of counsel for the Trustee and for SMI, including the closing argument briefs submitted by the Trustee and SMI; having been fully advised in the premises, and for the

reasons stated orally and recorded in open court , which shall constitute the record of this Court<sup>1</sup>, the Court finds and concludes as follows:

1. SMI is the initial transferee and therefore liable under 11 U.S.C. § 550 for the avoided preferential transfers received on December 21, 2007 for \$5,000.00, on January 2008 for \$5,000.00, and on February 5, 2008 for \$7,500.00. Accordingly, SMI's total liability for these preferential transfers is \$17,500.00.

2. With respect to all other avoided transfers at issue in this adversary proceeding, SMI is the quintessential conduit who is innocent of wrongdoing and deserving of protection, and therefore SMI is not liable for any these avoided transfers.

**ACCORDINGLY**, it is hereby **ORDERED** that Philip von Kahle, as Liquidating Trustee, whose last known address is 1804 Sherman Street, Hollywood, Florida 33020, shall recover from the Defendant, Studio Marc International, Inc., whose last known address is 4493 S. Atlantic Avenue, No. 204, New Smyrna Beach, Florida 32169, the principal sum of **Seventeen Thousand Five Hundred and 00/100 Dollars (\$17,500.00)**, which shall bear interest at the current statutory rate, for all of which let execution issue forthwith.

November 30, 2011

DONE AND ORDERED in Tampa, Florida on \_\_\_\_\_.



Honorable Michael G. Williamson  
United States Bankruptcy Judge

Copies to be provided by CM/ECF service.

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<sup>1</sup> A true and correct copy of the transcript of the Court's ruling on August 16, 2011 is attached hereto and incorporated herein as **Exhibit A** to this Final Judgment.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

- - - - -x  
IN RE: :  
: :  
KEY DEVELOPERS GROUP, LLC : Case No. 8:08-bk-2929-MGW  
: :  
Debtor :  
- - - - -x  
PHILLIP VON KAHLE, :  
Liquidating Trustee :  
: :  
Plaintiff :  
vs. : Adversary No. 8:09-ap-0419  
: :  
STUDIO MARC INTERNATIONAL, INC.:  
: :  
Defendant :  
- - - - -x

U.S. Courthouse  
801 N. Florida Avenue  
Tampa, Florida  
August 16, 2011  
3:00 P.M.

**TRANSCRIPT**

Court's Oral Ruling  
Trial on Amended Complaint to Recover Money or Property

**BEFORE THE HONORABLE MICHAEL G. WILLIAMSON  
UNITED STATES BANKRUPTCY JUDGE**

PROCEEDINGS DIGITALLY RECORDED BY COURT PERSONNEL.  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE  
APPROVED BY ADMINISTRATIVE OFFICE OF U.S. COURTS.

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**JOHNSON TRANSCRIPTION SERVICE**  
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## A P P E A R A N C E S:

On behalf of Plaintiff  
Phillip Von Kahle,  
Liquidating Trustee:

SETH TRAUB, Esquire  
Shumaker, Loop & Kendrick  
101 East Kennedy Boulevard  
Suite 2800  
Tampa, Florida 33602  
(813) 229-7600

On behalf of Defendant  
Studio Marc  
International, Inc.:

LUIS MARTINEZ-MONFORT, Esquire  
KEITH MEEHAN, Esquire  
Brewer Perotti Martinez-Monfort  
400 North Tampa Street  
Suite 2600  
Tampa, Florida 33602  
(813) 228-0740  
lmmonfort@gbmmlaw.com

Via Telephone:

PHILLIP VON KAHLE,  
Liquidating Trustee

MARC VAN STEENLANDT



1 into account the credibility of the witness who testified at  
2 trial. Based on that, I am now able to announce my findings  
3 of fact and conclusions of law, pursuant to Bankruptcy  
4 Rule 7052, which incorporates by reference Federal Rule of  
5 Civil Procedure 52(a)(1).

6 Those findings of fact and conclusions of law are  
7 as follows: As stipulated by the parties, this case  
8 involves eight transfers made by the Debtor to Studio Marc,  
9 the Defendant, from December 21, 2007 until May 5, 2008.  
10 Five of these transfers, totaling \$1,360,930, were made in  
11 the 90 days preceding the bankruptcy and are stipulated to  
12 be preferential.

13 The remaining three transfers were made after the  
14 Petition date of March 5, 2008, total \$1,279,879.71, and are  
15 stipulated to be impermissible post-petition transfers. The  
16 parties agree that all of these transfers are avoidable  
17 under either Section 547 or 549.

18 The sole issue before the Court that was the  
19 subject of the trial, that was conducted on July 11th, was  
20 whether Studio Marc, as a recipient of these transfers, is  
21 liable for the amount of the transfers under Section 550.

22 The Court makes the following findings of fact. I  
23 believe that, in substantial part, these findings -- or,  
24 rather, the facts were undisputed.

25 The Debtor was the developer of The Place at

1 Channelside, a condominium project containing 244  
2 residential units. This Court presided over the Chapter 11  
3 case of the Debtor. The Debtor was sold in a 363 sale.  
4 Certain assets, including avoidance actions, were left with  
5 a Liquidating Trustee, Mr. Von Kahle, who has ably served in  
6 that role.

7 Pertinent to this adversary proceeding, in April  
8 of 2003, the Debtor and Studio Marc entered into an  
9 agreement under which Studio Marc was to provide  
10 architectural design services with respect to the project.  
11 Typically, under such an agreement, Studio Marc would hire a  
12 team of subcontractors to perform the obligations under the  
13 agreement. In such cases, Studio Marc would direct the  
14 contract with the subcontractors and would be directly  
15 invoiced by them for services performed. Studio Marc, in  
16 such cases, would then invoice the client and, upon receipt  
17 of payment, disburse funds to the subcontractors.

18 However, in this case Studio Marc was engaged  
19 after the project was underway. The Debtor had already  
20 contracted with various subcontractors. As a result, Studio  
21 Marc did not have direct contractual privity with the  
22 subcontractors when it undertook the job of overseeing the  
23 project.

24 Nevertheless, for purposes of accounting and  
25 payment to the subcontractor, the invoices for the

1 subcontractor's services were included by Studio Marc in  
2 Studio Marc's regular invoices.

3 In this case, somewhat unusually to Studio Marc's  
4 regular course of conduct, when Studio Marc received  
5 payment, at the instruction of the Debtor, Studio Marc  
6 would then return the payment that it received to the  
7 Debtor, who in turn would proceed to pay the subcontractors.  
8 While the Debtor received a portion of the monies that were  
9 -- excuse me -- while Studio Marc received a portion of the  
10 monies that were paid to it at the inception of the  
11 relationship, by June of 2006, at the request of the Debtor,  
12 Studio Marc entered into an agreement to defer its fees  
13 until completion of the project.

14 From March 2004 through May of 2008 Studio Marc  
15 received payments totaling \$5,360,911.71, from which it  
16 retained \$224,606.71. The balance of these monies was paid  
17 back to the Debtor's principal for payment to the  
18 subcontractors.

19 At trial, Studio Marc testified through its  
20 principal that it was never advised by any of the  
21 subcontractors that they remained unpaid for services. In  
22 addition, it is noteworthy that only one of the  
23 subcontractor's filed a proof of claim in the case in the  
24 amount of approximately 22,000. The Court can reasonably  
25 infer from the circumstances that in fact the money paid

1 back by Studio Marc to the Debtor's principal was used to  
2 pay these third-party subcontractors.

3 On November 6th, 2007 Studio Marc sent a written  
4 demand to the Debtor with respect to the outstanding  
5 indebtedness for the architectural and engineering services  
6 provided by Studio Marc, for which a balance was owed of  
7 \$1,343,430. Again, on January 11, 2008 Studio Marc sent a  
8 second notice for this amount. On January 21, 2008 Studio  
9 Marc sent another demand for the \$1,343,430 in deferred  
10 professional fees and an additional \$1,200,000 in  
11 outstanding fees owing for furniture, fixtures and  
12 equipment, the design of the sale center and owner  
13 representation services. Another demand was sent on  
14 February 4th, 2008. Of the total fees owed of \$2,543,430  
15 approximately 950 was due to Studio Marc, with remainder  
16 amounts due to subcontractor.

17 Pre-petition, Studio Marc received five transfers.  
18 These were December 21, 2007 for \$5,000; on January 25, 2008  
19 for \$5,000; on February 5, 2008 for \$7500; on February 27th,  
20 2008 for \$1,243,430; and, on February 28, 2008 for \$100,000.

21 With respect to the \$1,343,430 received in two  
22 separate transfers on February 27 and February 28, as  
23 instructed by the Debtor, Studio Marc once again deferred  
24 its fees and immediately transferred back to the Debtor's  
25 principal on February 29th, 2008 the full \$1,343,430. This

1 was the eighth time that Studio Marc had received money and  
2 then turned around and transferred money back during the  
3 course of the four years of the project. The funds were  
4 transferred to the Debtor's principal's personal account,  
5 pursuant to wiring instructions provided to Studio Marc. At  
6 the time of the transfer, Studio Marc did not know that the  
7 Debtor was contemplating bankruptcy.

8 After the filing of the case on March 5, 2008 and  
9 on March 12th, 2008 Studio Marc received a second payment of  
10 \$1,260,370.71 in connection with the contract to provide  
11 furniture, fixtures, equipment, the sales center design and  
12 owner representation services. That check was deposited by  
13 Studio Marc on March 13, 2008. The check was drawn on a  
14 non-debtor affiliate of the Debtor, Key Developers  
15 Investments, LLC, with funds it received from the Debtor.

16 At the time that Studio Marc received this check,  
17 Studio Marc learned of the Debtor's bankruptcy filing.  
18 Studio Marc's principal was told to the effect that the  
19 bankruptcy filing would have no effect on its continued  
20 services and completion of the work.

21 Once again, with respect to this post-petition  
22 transfer, Studio Marc deferred its fees and transferred  
23 \$1,174,000 of these funds to the Debtor's principal on  
24 April 1, 2008, the ninth such transfer over four years. Out  
25 of the full amount of the post-petition transfer, Studio

1 Marc received \$65,370.71. The balance was paid to the  
2 Debtor's principal. Studio Marc also received subsequent  
3 transfers on March 16, 2008 in the amount of \$12,000 and on  
4 March 5, 2008 in the amount of \$7500.

5 Even though Studio Marc was still owed substantial  
6 amounts with respect to the project, it continued to work on  
7 the project until the project completion in October of 2008.  
8 As with the fees incurred prior to the bankruptcy, Studio  
9 Marc has not been paid for these post-petition services  
10 either.

11 The only witness to testify at trial was Studio  
12 Marc's principal. He appeared to the Court to be completely  
13 credible. It is noteworthy that Studio Marc's relationship  
14 with the Debtor was arm's length. Studio Marc was not  
15 involved in the financial operations of the Debtor, had no  
16 involvement with the financing of the project, no control or  
17 signatory authority over the Debtor's bank accounts, no  
18 ownership interest in the Debtor, nor was any officer,  
19 shareholder, director of Studio Marc an officer,  
20 shareholder, or director of the Debtor.

21 Based on this testimony, it appears that from his  
22 standpoint Studio Marc's principal provided services -- or  
23 Studio Marc's principal understood that the services were  
24 provided in complete compliance with Studio Marc's  
25 contractual obligations. Studio Marc received and remitted

1 funds with respect to the project, as instructed by the  
2 Debtor owner.

3 Studio Marc's principal cooperated in all respects  
4 throughout these proceedings, to include providing  
5 information to the bank, holding the mortgage on the  
6 property with respect to all of the transfers which were the  
7 subject matter of this adversary. He now finds himself a  
8 Defendant by virtue of the happenstance that monies flowed  
9 through his hands to third parties, thus potentially  
10 exposing him to liability as the initial transferee under  
11 Section 550 of transfers that are either avoidable as  
12 preferential under Section 547 or as post-petition transfers  
13 under Section 549, even though he has not in fact been paid  
14 for his services.

15 The Court makes the following conclusions of law:  
16 The Court has jurisdiction over this adversary proceeding  
17 pursuant to 28 U.S.C. § 1334. This is a core proceeding,  
18 pursuant to 28 U.S.C. § 172(b)(2)(A), (F), (H) and (O).

19 This case rises or falls on whether or not Studio  
20 Marc is liable for these admittedly avoidable transfers  
21 under Section 550. Under Section 550, the initial  
22 transferee of an avoidable transfer is absolutely liable.

23 For example, once it is established that a  
24 transfer was fraudulently made, the recipient of the  
25 fraudulent transfer cannot plead innocence as a defense. As

1 this Court held in McCarn's Allstate, neither innocence in  
2 action or unfairness in result is a defense. Section 550  
3 leaves no room to fashion a remedy that treats the initial  
4 transferee equitably under the circumstances of any given  
5 case. The only recognized defense that can be asserted by  
6 someone receiving such funds is that the person receiving  
7 the funds was a mere conduit and not the initial transferee.

8 Most recently, in In re Harwell, the Eleventh  
9 Circuit summarized the elements of a mere conduit defense as  
10 follows: One, that the initial transferee did not have  
11 control over the assets received, that is, that the initial  
12 transferee merely served as a conduit for the transfers  
13 under the control of the debtor transferrer; and, two, that  
14 the initial transferee acted in good faith and as an  
15 innocent participant in the fraudulent transfer.

16 In Harwell, the Eleventh Circuit recognized the  
17 conduit defense as an equitable exception to what would  
18 otherwise be absolute liability for an initial transferee.  
19 In this respect the Eleventh Circuit adopted a flexible,  
20 pragmatic, equitable approach of looking beyond the  
21 particular transfer in question to the circumstances of the  
22 transaction in its entirety. That is, the mere conduit or  
23 control test is a judicial creation that is not based on  
24 statutory language but is an exception based on the  
25 Bankruptcy Court's equitable powers.

1           As stated in Nordberg vs. Granfinanciera, this  
2 approach is consistent with the equitable concepts  
3 underlying bankruptcy law. Based on these concepts, it is  
4 appropriate to apply Section 550 consistent with the facts  
5 and circumstances of a particular case to prevent recovery  
6 from a transferee innocent of wrongdoing and deserving of  
7 protection.

8           The Court concludes in this case that Studio Marc  
9 has proven by the greater weight of the evidence entitlement  
10 to the mere conduit defense. First, with respect to the  
11 element that Studio Marc did not have control over the funds  
12 received, the Court finds as follows: On nine separate  
13 occasions the Debtor transferred funds to Studio Marc with  
14 the understanding and explicit instructions that, out of  
15 the proceeds, a substantial amount were all of the money  
16 to be immediately returned to the Debtor for payment to  
17 third- party contractors. Studio Marc complied in each  
18 instance. In many respects, this is no different from an  
19 attorney handling escrow funds for a client.

20           While Studio Marc certainly had the ability to  
21 disregard these instructions, just as an attorney could  
22 violate his trust and convert escrow funds, Studio Marc  
23 conducted itself through its principal as an ethical  
24 businessman and dealt with the funds as directed by the  
25 party transferring the funds, in this case the owner of the

1 project.

2           It would be one thing if Studio Marc had used the  
3 funds for some other purpose other than as directed by the  
4 Debtor, but that's not what happened here. Rather, Studio  
5 Marc did as instructed in the belief, and apparently  
6 correctly, that the funds were needed to pay third-party  
7 subcontractors. Studio Marc asserted no independent control  
8 over the funds.

9           This is different from the situation confronted by  
10 Judge Jennemann in the Cypress Restaurants of Georgia case.  
11 As Judge Jennemann stated in that case: When the transferee  
12 is a creditor or has a business relationship with the debtor  
13 and it receives a transfer that is applied to its own debt,  
14 the transferee cannot be a conduit.

15           In fact, in this case the money received was never  
16 applied to Studio Marc's own debt. Rather, it was  
17 immediately used to pay back to the Debtor so that it could  
18 make payments to the various subcontractors, unlike the  
19 situation in Cypress Restaurants where the money was paid  
20 without any reservation or directions or explicit  
21 instructions to pay it back. In this case the money was  
22 paid with explicit and contemporaneous instructions that the  
23 money needed to be immediately paid back so that it could be  
24 used to pay subcontractors.

25           Second, it was clear that Studio Marc acted in

1 good faith and was in innocent participation in these  
2 transfers. Certainly with respect to the pre-petition  
3 payments, Studio Marc had no idea of a pending bankruptcy.  
4 It was simply following the directions of the owner with  
5 respect to the flow of money to pay necessary expenses  
6 associated with the development. Studio Marc was also not  
7 involved in the bankruptcy case in any way, other than to  
8 continue to provide services in the mistaken belief that the  
9 bankruptcy case would not affect Studio Marc and ultimately  
10 Studio Marc would be paid.

11 To the contrary, Studio Marc, to this date, has  
12 not been paid and is now being sued for approximately  
13 \$2,600,000 with respect to transfers that passed through its  
14 hands so that other parties associated with the project  
15 could be paid.

16 Studio Marc has also raised the defense that with  
17 respect to the post-petition transfers it was not the  
18 initial transferee. Rather, it points out that as a  
19 technical matter the funds were paid by the Debtor to an  
20 affiliate, Key Developers Investments, LLC, which I'll refer  
21 to as "KDI."

22 Pertinent to this contention, KDI had as its sole  
23 managing member the same sole managing member as the Debtor.  
24 It shared the Debtor's principal place of business. Its  
25 bank account was used from time to time to pay certain

1 expenses of the Debtor. This included a substantial payment  
2 to the homeowners association after the bankruptcy case was  
3 filed. The funds that KDI used for these payments came from  
4 the Debtor.

5 Based on these facts, the Plaintiff argues that  
6 KDI's technical existence should be ignored and that all  
7 funds paid by the Debtor to KDI, which in turn were paid to  
8 Studio Marc, should be treated as if KDI did not exist. In  
9 essence, the Plaintiff wishes for this Court to treat KDI as  
10 the alter ego of the Debtor.

11 Other than the fact that KDI was used to fund a  
12 number of payments to the Debtor and that the Debtor and KDI  
13 were affiliates controlled by the same individual, there was  
14 insufficient evidence to support a finding that the Debtor  
15 and KDI were one and the same entity. There was no  
16 testimony to support the theory that KDI did not have some  
17 valid, independent reason for its existence separate and  
18 apart of its involvement in this project, that its assets  
19 and those of the Debtor's were commingled in all material  
20 respects, that its principals disregarded any corporate  
21 formalities with respect to the two entities, or the other  
22 type of proof that would ordinarily be required in an alter  
23 ego case.

24 Accordingly, the Court concludes that the  
25 Plaintiff has failed to carry its burden of proof with

1 respect to establishing that KDI was the alter ego of the  
2 Debtor. Thus, payments received by Studio Marc from KDI  
3 were received as the immediate, rather than the initial  
4 transferee. Given that Studio Marc was the immediate  
5 transferee of the post-petition transfers, it is not liable  
6 to the extent that it took those transfers for value, in  
7 good faith, and without knowledge of the avoidability of the  
8 transfers.

9 Studio Marc has established each of these  
10 elements. Obviously, it took for value, since it expended  
11 substantial amount of work and effort for which it was never  
12 compensated, all with respect to the project. As referenced  
13 above, it took in good faith and had no knowledge of  
14 avoidability of these transfers.

15 In conclusion, based on the foregoing, the Court  
16 concludes that Studio Marc was only the initial transferee  
17 and liable for the preferences received on December 21, 2007  
18 for \$5,000, January 2008 for \$5,000, and February 5, 2008  
19 for 7500, for a total liability of \$17,500.

20 However, with respect to the other transfers, the  
21 Court concludes that this is a case of someone who was  
22 caught in the middle, the quintessential conduit who is  
23 innocent of wrongdoing, and deserving of protection.

24 Accordingly, all other relief requested in the  
25 complaint is denied. Judgment will be entered accordingly.

1           I will ask Mr. Martinez-Monfort to prepare a form  
2 of final judgment consistent with my ruling from the bench,  
3 and I'll consider -- I may get a transcript of this. I'm  
4 not going to write it up beyond what I did for today's  
5 hearing and just attach it to that. But if you could  
6 prepare a form of order, run it by Mr. Traub.

7           MR. MARTINEZ-MONFORT: Your Honor, as fast as I  
8 write, I might actually need to request a transcript.

9           THE COURT: That's fine.

10          MR. MARTINEZ-MONFORT: Okay. And you would want  
11 it all as one document and not simple order and then follow  
12 it up with conclusions of law and findings of fact?

13          THE COURT: No. I don't want you to type up what  
14 I just said independent of -- I'll tell you what, get the  
15 transcript and say, for the reasons stated orally in open  
16 court, and put a footnote in, the transcript of the hearing  
17 is attached -- or the ruling from the bench, and we'll just  
18 leave it the way I said it, no matter imperfect that may be.

19          And then make the final judgment just simple. It  
20 will provide some relief or some liability to your client,  
21 and you need to put that in there. Run that by Mr. Traub.

22          MR. MARTINEZ-MONFORT: Yes, Your Honor.

23          THE COURT: Okay. Is there anything else that we  
24 can attend to in the Von Kahle versus Studio Marc case here  
25 this afternoon?

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(No response).

THE COURT: Okay, very well. Court will be in recess. Thank you all.

THE COURTROOM DEPUTY: All rise.

(Whereupon, at 3:26 p.m., proceedings adjourned.)

## C E R T I F I C A T E

I, GRETCHEN L. SCHULTZ, Certified Reporter, hereby certify that the foregoing is the official transcript, prepared to the best degree possible from the digital audio recording and logs provided by the Court.

I further certify that I am neither counsel for, nor related to, nor an employee of any of the parties to the action in which this hearing was taken.

I further certify that I have no personal interest in the outcome of the action.

Dated this 26th day of August, 2011, Pasco County, Florida.

A handwritten signature in cursive script, appearing to read "Gretchen L. Schultz", is written over a horizontal line.

Gretchen L. Schultz,  
Certified Reporter  
Notary Commission No. DD0949567  
My Commission Expires: 1/3/14