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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-10-1188-NoPaD
)
 DOWNEY REGIONAL MEDICAL) Bk. No. LA 09-34714 BB
 CENTER-HOSPITAL, INC.,)
)
 Debtor.)
 _____)
)
 ALLEN R. KORNEFF,)
)
 Appellant,)
)
 v.) **O P I N I O N**
)
 DOWNEY REGIONAL MEDICAL)
 CENTER-HOSPITAL, INC.;)
 ING LIFE INSURANCE AND)
 ANNUITY COMPANY,)
)
 Appellees.)
 _____)

Argued and Submitted on September 23, 2010
at Pasadena, California

Filed - November 16, 2010

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

Hon. Sheri Bluebond, Bankruptcy Judge, Presiding.

Appearances: Richard D. Burstein of Ezra Brutzkus Gubner LLP
 appeared for Appellant Allen R. Korneff
 Lisa Hill Fenning of Arnold & Porter, LLP appeared
 for Appellee Downey Regional Medical
 Center-Hospital, Inc.

Before: NOVACK,¹ PAPPAS and DUNN, Bankruptcy Judges.

¹Hon. Charles Novack, Bankruptcy Judge for the Northern
District of California, sitting by designation.

1 NOVACK, Bankruptcy Judge:

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3 Appellant Allen Korneff ("Korneff") appeals from an order
4 approving a stipulation between debtor Downey Regional Medical
5 Center-Hospital, Inc. ("Downey") and ING Life Insurance and
6 Annuity Company ("ING") regarding turnover of more than \$1.6
7 million that Downey had deposited with ING ("ING account")
8 pursuant to a deferred compensation plan. Korneff, Downey's
9 former CEO and a participant in the plan, objected to the
10 stipulation and asserted that approximately \$1.4 million in the
11 ING account belonged to him, rather than Downey's bankruptcy
12 estate. Rejecting Korneff's request to proceed by adversary
13 proceeding, the bankruptcy court determined as a matter of law
14 that the funds in the ING account were property of the bankruptcy
15 estate and approved the stipulation providing for the liquidation
16 of the ING account and its transfer to Downey for its
17 unrestricted use.

18 For the following reasons, we AFFIRM.

20 I. FACTS

21 A. Prepetition Background.

22 1. AHA's Master Compensation Deferral Plan.

23 In April 1975, the American Hospital Association ("AHA")
24 established a Master Compensation Deferral Plan ("Master Plan").
25 AHA members and affiliated organizations could adopt the Master
26 Plan and, through it, provide retirement benefits to their
27 officers and employees. Under its terms, participants could
28 defer a portion of their compensation in return for future

1 benefits provided through the Master Plan. The deferred
2 compensation would remain part of the participating employer's
3 unrestricted assets and would not be held in trust. The
4 employer's obligations under the Master Plan were "purely
5 contractual" and not "funded or secured in any way."

6 Shortly after establishing the Master Plan, the AHA
7 requested and the Internal Revenue Service provided a letter
8 ruling regarding the tax consequences of any such deferred
9 compensation. The IRS ruled that deferred amounts would
10 constitute income to a participant only when the deferred amounts
11 were paid or made available to the participant, not when they
12 were earned. To fall within the ruling, deferred compensation
13 had to remain the sole property of the AHA,² subject to claims of
14 its general creditors and available for whatever purpose the AHA
15 desired to use it.

16 In June 1983, the Master Plan was amended and restated, but
17 it retained the essential character of the 1975 plan by allowing
18 eligible³ officers, employees and contractors of a participating
19 employer to defer compensation pursuant to the restated Master
20 Plan. As restated, the Master Plan expressly provided that
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25 ²The scope of the IRS ruling was expressly limited to the
26 AHA and the Master Plan. The IRS advised that AHA members should
request separate rulings with respect to their own plans.

27 ³Participants had to meet certain eligibility requirements
28 of the Employee Retirement Income Security Act of 1974 ("ERISA")
for unfunded plans of deferred compensation.

1 All amounts of compensation deferred⁴ under this Plan,
2 all property and rights which may be purchased by the
3 Employer with such amounts and all income attributable
4 to such amounts, property or rights to property shall
5 remain the sole property and rights of the Employer
6 without being restricted by the provisions of this
7 Plan, subject only to the claims of the Employer's
8 general creditors. The obligation of the Employer
9 under this Plan is purely contractual and shall not be
10 funded or secured in any way.

11 It further authorized the AHA and its members to invest deferred
12 compensation in an annuity contract with Aetna Life Insurance and
13 Annuity Company ("Aetna") from which benefits under the Master
14 Plan could be paid. Investment in an annuity contract was for
15 the employer's convenience, and the annuity remained the sole
16 property of the employer. The annuity contract could not be held
17 in trust or as collateral security for the benefit of any
18 participant.

19
20 2. Downey's Deferred Compensation Plan And Related
21 Investment Account.

22 In December 1978, with Korneff as its CEO, Downey adopted
23 the Master Plan and established a deferred compensation plan for
24 its employees. It also elected to participate in the group
25 annuity contract issued by Aetna, ING's predecessor, to fund the
26 benefits due under the Master Plan. The ING account, formally
27 styled "Downey Community Hospital VK 1473," was in Downey's name.

28 Korneff, the first person to participate in Downey's
deferred compensation plan, signed a Participation Agreement on
June 27, 1984. In the agreement, he elected to defer a portion

⁴The 1983 Master Plan defined deferred compensation to
include "Compensation not yet earned, . . . which the Participant
and the Employer mutually agree shall be deferred in accordance
with the provisions of this Plan."

1 of his annual compensation in return for the benefits provided in
2 the Master Plan. The benefits due were to be determined as if
3 Korneff's deferred compensation had been invested in the Aetna
4 annuity contract and accumulated in the Aetna investment funds
5 that he specified. Korneff acknowledged receipt of the Master
6 Plan and represented that he understood its provisions. He
7 further acknowledged that the Aetna annuity contract was
8 "exclusively owned and controlled by [Downey] subject to the
9 claims of [Downey's] general creditors." By January 2010, the
10 ING account held approximately \$1.4 million attributable to
11 Korneff's compensation deferrals. He did not pay income tax on
12 the deferred amounts.

13 Five other doctors ("doctor participants") employed by
14 Downey also elected to participate in Downey's deferred
15 compensation plan. The portion of the ING account attributable
16 to their aggregate deferred compensation was approximately
17 \$200,000.

18
19 **B. Postpetition Facts And Procedural History.**

20 In 2009, Downey suffered a liquidity crisis created by
21 internal accounting and financial infrastructure problems.
22 Downey sought relief from its financial turmoil by filing a
23 Chapter 11 petition on September 14, 2009.

24 In January 2010, Korneff filed two proofs of claim in the
25 bankruptcy case. The first claim was for damages arising from
26 Downey's rejection of Korneff's employment agreement. The
27 second, filed as a "protective" claim, asserted that Korneff
28

1 owned various retirement accounts held by Downey, including \$1.4
2 million in the ING account.

3 A few months later, in a letter dated March 31, 2010,
4 Downey's President and CEO advised Tom Otto of Centaurus
5 Financial that the funds held in the ING account were property of
6 Downey's bankruptcy estate and were subject to the claims of
7 Downey's general creditors. Downey instructed Otto to provide a
8 detailed accounting of the assets in the account, to liquidate it
9 and to transfer the funds to Downey.

10 Although ING has never asserted any ownership or beneficial
11 interest in the ING account, ING initially refused to turn over
12 the funds due to its belief that Downey had assigned some
13 interest in the funds to the Social Security Administration
14 ("SSA") for Medicare reimbursements. Downey and ING thereafter
15 agreed that ING would turn over the proceeds of the ING account
16 to Downey on two conditions: 1) Downey had to obtain a court
17 order authorizing the turnover after notice and hearing to the
18 SSA and the participants in Downey's deferred compensation plan;
19 and 2) Downey had to release and indemnify ING.

20 On April 28, 2010, Downey filed an emergency motion to
21 approve a stipulation reflecting its agreement with ING. An
22 initial hearing was held the next day, and Korneff appeared
23 through counsel.

24 At the hearing, the bankruptcy court questioned whether
25 Downey had provided adequate notice to all interested parties.
26 Downey's counsel conceded that notice was not sufficient and
27 requested a continuance to re-serve notice and to address issues
28 raised by Korneff. Through counsel, Korneff urged that an

1 adversary proceeding was required to determine whether the funds
2 in the deferred compensation account were excluded from the
3 bankruptcy estate under § 541(b)(7) of the Code. The bankruptcy
4 court continued the hearing for two weeks, directed Downey's
5 counsel to re-serve the moving papers and set a briefing schedule
6 for any opposition to be filed.

7 Korneff filed the only written opposition to Downey's
8 emergency motion to approve its stipulation with ING.⁵ Korneff
9 argued that a bona fide dispute existed concerning whether the
10 ING account funds were excluded from Downey's bankruptcy estate
11 under § 541(b)(7). He asserted that Downey's deferred
12 compensation plan was "subject to" ERISA and that \$1.4 million in
13 the ING account had been "withheld" from his wages within the
14 meaning of § 541(b)(7). He insisted that an adversary proceeding
15 with discovery was required to resolve this dispute and advised
16 the bankruptcy court that he had retained a forensic accountant
17 who could substantiate his claim that the funds had been withheld
18 from his wages. Korneff also argued that ING account statements,
19 which listed him as a participant, provided additional evidence
20 that the funds belonged to him. He further submitted a page from
21 Downey's 2005 tax return, Form 990. Based on that single page,
22 Korneff asserted that Downey had booked \$70,256 in 2005
23 contributions to employee benefit plans on behalf of Korneff,
24 including \$30,600 paid into the ING account. Korneff opined that

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26 ⁵Between the initial and final hearings on the emergency
27 motion to approve the stipulation, Downey agreed to create a
28 \$100,000 reserve from any ING account funds turned over pending
the SSA's inquiry into whether it had any Medicare reimbursement
claims against the funds. The government ultimately concluded
that it had no such claims.

1 Downey's tax-related characterization of the \$70,256 as an
2 expense rather than income demonstrated that it was "withheld"
3 income as opposed to "deferred" income.

4 At the final hearing, the bankruptcy court heard additional
5 argument from Korneff's counsel. In sum, counsel urged that the
6 bankruptcy court should ensure that Korneff received due process
7 in the form of an adversary proceeding or, at a minimum, an
8 evidentiary hearing before deciding whether the ING account
9 constituted property of Downey's estate. Counsel represented
10 that, if given an opportunity, Korneff would offer expert
11 testimony on the meaning of the phrase "subject to Title I of
12 ERISA" as used in § 541(b)(7). He further stated that Korneff
13 would offer Downey's tax returns to demonstrate how Downey
14 treated its payments into the ING account for tax purposes, and
15 would provide expert testimony on what it means to "withhold"
16 money from wages under § 541(b)(7). An attorney specializing in
17 employee benefits and executive compensation also argued on
18 Korneff's behalf during the May 13 hearing. He opined that
19 1) top-hat deferred compensation plans are "subject to Title I of
20 ERISA" within the meaning of § 541(b)(7); 2) Downey's deferred
21 compensation plan might not qualify as a top-hat plan; and
22 3) there is no distinction between "withholding" compensation and
23 "deferring" compensation for purposes of § 541(b)(7).

24 At the conclusion of the hearing, the bankruptcy court
25 overruled Korneff's objection, finding that:

- 26 1. There were no material issues of fact that required an
27 adversary proceeding;

- 1 2. All issues could be resolved as a matter of law based
2 on a simple reading of the operative documents and the
3 admitted facts;
- 4 3. The undisputed facts established that the funds on
5 deposit with ING were not excluded from the estate
6 under § 541(b) (7);
- 7 4. Deferral of compensation is not the same as having
8 funds withheld from one's wages as required by
9 § 541(b) (7); and
- 10 5. Downey's deferred compensation plan was not a plan
11 subject to Title I of ERISA or a deferred compensation
12 plan under § 457 of the Internal Revenue Code.

13 The bankruptcy court explained that there was no genuine issue of
14 material fact because the parties agreed on (a) the authenticity
15 of the documents governing Downey's deferred compensation plan,
16 (b) where the funds were located and (c) the manner in which the
17 ING account was established. It further added that, in drafting
18 § 541(b) (7), Congress never intended to permit highly compensated
19 executives to contribute unlimited amounts to a deferred
20 compensation plan on which they paid no tax and yet be able to
21 exclude the plan funds from the employer's bankruptcy estate.

22 Following the bankruptcy court's ruling, counsel for ING
23 questioned whether Downey had sufficiently re-served notice on
24 the five doctor participants. Although Downey's counsel could
25 not locate a proof of service to establish service on the doctor
26 participants, she stated that she had seen the mailing envelopes
27 and was certain that the doctor participants had been served.

28 The bankruptcy court directed Downey's counsel to submit a

1 supplemental proof of service along with the proposed order.
2 That same day, Downey filed a Supplemental Proof of Service
3 stating that on May 3, 2010 Downey had served its emergency
4 motion to approve stipulation and the notice of continued hearing
5 on each of the doctor participants by overnight mail.⁶ The
6 bankruptcy court entered its order approving the stipulation
7 between Downey and ING and finding that proper notice had been
8 given to the doctor participants ("Turnover Order").

9 On May 25, 2010, Korneff, represented by new counsel, filed
10 an emergency motion for a stay pending appeal of the Turnover
11 Order. The motion urged that the potential harm to Korneff was
12 enormous if the ING account funds were turned over to Downey. In
13 addition, Korneff asserted that a likelihood of success on the
14 merits and the lack of prejudice to the estate justified the
15 issuance of a stay.

16 The bankruptcy court denied Korneff's request for a stay.
17 It reiterated that it had ruled on the issues as a matter of law
18 based on undisputed facts and concluded that Korneff had failed
19 to demonstrate a likelihood of success on the merits of his
20 appeal. It found that Korneff had actual notice of Downey's
21 emergency motion to approve the stipulation for turnover of the
22 ING account and ample opportunity to be heard on all relevant
23 issues. The bankruptcy court also concluded that Korneff lacked
24 standing to address any alleged lack of notice to the doctor
25 participants.

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27 ⁶The Supplemental Proof of Service was signed by one of the
28 attorneys for Downey, but it is not signed under oath or as an
unsworn declaration under penalty of perjury as required by Fed.
R. Civ. P. 4(1)(1), made applicable by Rule 7004(a)(1).

1 The appellant timely filed a notice of appeal.

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3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
5 and § 157(b) (2) (E). We have jurisdiction under 28 U.S.C. § 158.
6

7 **III. ISSUES**

8 1. Did the bankruptcy court err when it determined that no
9 adversary proceeding was required?

10 2. Did the bankruptcy court err when it determined that, as a
11 matter of law, the funds in the ING account were not excluded
12 from the bankruptcy estate under § 541(b) (7)?
13

14 **IV. STANDARDS OF REVIEW**

15 We review the bankruptcy court's decision not to require an
16 adversary proceeding using a harmless error analysis.
17 USA/Internal Revenue Service v. Valley Nat'l Bank (In re Decker),
18 199 B.R. 684, 689 (9th Cir. BAP 1996). The bankruptcy court's
19 findings of fact are reviewed for clear error, while its
20 conclusions of law, including construction of the Code and Rules
21 are subject to de novo review. Cogliano v. Anderson (In re
22 Cogliano), 355 B.R. 792, 800 (9th Cir. BAP 2006). Whether
23 property is included in a bankruptcy estate is a question of law
24 that is reviewed de novo. Id.

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V. DISCUSSION

A. **The Bankruptcy Court's Decision Not To Require An Adversary Proceeding, Even If Erroneous, Was Harmless.**

Korneff steadfastly argues that an adversary proceeding was required to resolve ownership of the ING account funds. The bankruptcy court disagreed and considered its ruling to be in the nature of summary judgment in a contested matter. The court specifically stated that it was deciding the issues as a matter of law on the basis of undisputed facts.

Even if Downey's emergency motion constituted a proceeding to determine an interest in property that required an adversary proceeding, Fed. R. Bankr. P. Rule 7001(2), the bankruptcy court's decision not to require an adversary proceeding is subject to a harmless error analysis. Austein v. Schwartz (In re Gerwer), 898 F.2d 730, 734 (9th Cir. 1990); In re Decker, 199 B.R. at 689. Under this standard, if the absence of an adversary proceeding did not cause prejudice, form should not be elevated over substance. Decker, 199 B.R. at 689. The question then is whether some procedural difference between contested matters and adversary proceedings prejudiced Korneff. The record here indicates that, even if viewed as erroneous, the bankruptcy court's decision resulted in no harm to Korneff.

Korneff first asserts that without service of summons as in an adversary proceeding there was insufficient process to gain jurisdiction over the parties to the dispute. While a contested matter lacks the formality of a summons, complaint and answer that are required in an adversary proceeding, the initial pleading in a contested matter, the motion, is served in the same

1 manner as a summons in an adversary proceeding. Fed. R. Bankr.
2 P. Rule 9014(b). Thus, parties in both contested matters and
3 adversary proceedings are entitled to the same quality of
4 process. The absence of a summons does not provide a basis for
5 finding prejudice here.

6 Korneff additionally asserts that there is no proper proof
7 of service to establish that the doctor participants were
8 properly served with Downey's moving papers. As a result, he
9 contends that the bankruptcy court adjudicated the ownership of
10 the ING account funds without obtaining jurisdiction over all
11 necessary parties. There is no dispute that the bankruptcy court
12 had personal jurisdiction over Korneff. He had actual notice of
13 the motion to approve stipulation and the issues it raised. He
14 was represented by counsel at both the initial and the final
15 hearing on the motion and was afforded a reasonable opportunity
16 to respond. He received the process that was due to him. Smith
17 v. Wheeler Tech., Inc. (In re Wheeler Tech., Inc.), 139 B.R. 235,
18 239-40 (9th Cir. BAP 1992) (due process requires notice
19 reasonably calculated to apprise interested parties of the
20 pendency of an action and to afford them an opportunity to
21 present their objections).

22 With respect to the doctor participants, it is important to
23 note that personal jurisdiction is an individual right. Parsons
24 v. Plotkin (In re Pac. Land Sales, Inc.), 187 B.R. 302, 309 (9th
25 Cir. BAP 1995). In asserting that the bankruptcy court did not
26 have personal jurisdiction over the doctor participants due to
27 defective service of process, Korneff is attempting to assert the
28 doctors' individual constitutional rights to due process. He has

1 no standing to do so. Id. at 310. As the Panel in Pacific Land
2 Sales explained, federal courts must be hesitant to resolve
3 controversies involving the rights of third parties not before
4 the court. It may be that the holders of those rights have
5 simply chosen not to assert them. Id., citing Singleton v.
6 Wulff, 428 U.S. 106, 113-14 (1976).

7 Korneff argues, however, that the doctor participants are
8 indispensable parties to the dispute over ownership of the funds.
9 While Rule 7019, which provides for mandatory joinder of
10 necessary parties, applies in adversary proceedings, it is not
11 included in the list of Bankruptcy Rules that apply to contested
12 matters under Rule 9014. Korneff seems to argue that the absence
13 of an adversary proceeding prejudiced him because he could not
14 join the parties necessary to adjudicate ownership of the ING
15 account funds.

16 Joinder of a party under Rule 7019 is required when 1) in
17 its absence complete relief cannot be accorded among those
18 already parties, or 2) the absent party claims an interest
19 relating to the subject of the action and disposition of the
20 action in its absence might impair or impede its ability to
21 protect that interest or leave the present parties subject to a
22 substantial risk of double, multiple or inconsistent obligations.
23 Because the doctor participants do not appear to be necessary
24 parties under Rule 7019, Korneff has not suffered prejudice from
25 their absence. The dispute here is over ownership of liquid
26 funds. Complete relief between Korneff and Downey, namely
27 ownership of the portion of the ING account attributable to
28 Korneff, was fully adjudicated. The presence or absence of the

1 doctor participants could not cause him to lose any more or any
2 less. Under the second prong of Rule 7019, it is not apparent
3 that the absent doctor participants are claiming any interest in
4 the ING account. Further, Korneff has failed to point out any
5 double, multiple or inconsistent obligations that might result
6 from their absence. Thus, there is no evidence that the
7 inability to join the doctor participants prejudiced Korneff, and
8 the bankruptcy court's failure to proceed by way of adversary
9 proceeding again appears harmless.

10 Beyond his due process and jurisdictional arguments, Korneff
11 contends that he was prejudiced because the bankruptcy court did
12 not permit him to conduct discovery and present expert testimony
13 to interpret the terms "withheld" and "subject to" in the context
14 of § 541(b)(7). This argument is unavailing. First, Korneff was
15 not without an opportunity for discovery. Rule 9014 makes
16 discovery available in contested matters. Korneff could have
17 initiated discovery as soon as Downey filed its emergency motion
18 to approve stipulation. Discovery often proceeds more
19 expeditiously in a contested matter, and Korneff could have but
20 did not serve discovery before the continued hearing on the
21 emergency motion.

22 More importantly, Korneff has not identified any
23 discoverable fact that would have changed the outcome of the
24 court's ruling. The bankruptcy court based its ruling on
25 undisputed and unambiguous terms of Downey's deferred
26 compensation plan as well as the court's interpretation of
27 § 541(b)(7). Korneff's proposed discovery and expert testimony
28 would have been inappropriate because both the interpretation of

1 an unambiguous written contract and the meaning of a statute are
2 questions of law. McHugh v. United Serv. Auto. Ass'n, 164 F.3d
3 451, 454 (9th Cir. 1999) (expert testimony cannot be used to
4 provide legal meaning or to interpret contracts); Southland Corp.
5 v. Emerald Oil Co., 789 F.2d 1441, 1443 (9th Cir. 1986)
6 (interpreting written contract is a matter of law); Nellis v.
7 G.R. Herberger Revocable Trust, 360 F. Supp. 2d 1033, 1043 (D.
8 Ariz. 2005) (expert testimony about obvious meaning of statute
9 was inappropriate legal opinion).

10 Here, the bankruptcy court provided all of the procedures
11 required in a motion for summary judgment. The facts material to
12 determining ownership of the fund were undisputed. It was not
13 error to decline Korneff's request for discovery when there was
14 no apparent issue of fact. Khachikyan v. Hahn (In re
15 Khachikyan), 335 B.R. 121, 127 (9th Cir. BAP 2005) (debtor
16 seeking an adversary proceeding failed to articulate factual
17 issues requiring discovery).

18
19 **B. The Bankruptcy Court Correctly Determined That The Funds In**
20 **The Deferred Compensation Account Were Not Excluded From**
21 **Property Of The Estate.**

22 On appeal, there is no real dispute that Downey's deferred
23 compensation plan was an unfunded top hat plan.⁷ Because the

24 ⁷In the bankruptcy court, Korneff argued that Downey's
25 deferred compensation plan might not qualify as a top hat plan,
26 but he has not made that argument on appeal. Under ERISA a top
27 hat plan must be 1) "unfunded," and 2) "maintained by an employer
28 primarily for the purpose of providing deferred compensation for
a select group of management or highly compensated employees."
29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). While ERISA does
not define "unfunded," several circuit courts have recognized
that a plan is unfunded where: 1) beneficiaries of the plan

(continued...)

1 parties did not dispute the authenticity of the documents
2 establishing Downey's deferred compensation plan or the terms of
3 the plan, the bankruptcy court correctly relied on the
4 unambiguous provisions of the plan to determine that the ING
5 account funds were property of the estate. The ING account was
6 held in Downey's name and the plan documents plainly provided
7 that compensation deferred under the plan would remain part of
8 Downey's unrestricted assets and would not be held in trust. The
9 plan was unfunded and Downey's obligations were purely
10 contractual in nature. The participation agreement that Korneff
11 executed similarly acknowledged that any contributions to the ING
12 account remained the sole property of Downey. Based on these
13 undisputed facts, the bankruptcy court correctly determined that
14 Korneff held no interest in the ING account funds. The
15 interpretation of a written contract is a matter of law.
16 Southland Corp. v. Emerald Oil Co., 789 F.2d at 1443. Summary
17 judgment can be appropriate where the dispute is over the
18 interpretation, not the content, of the contractual terms. See
19 Continental Insur. Co. v. Metro-Goldwyn-Mayer, Inc., 107 F.3d
20 1344, 1346 (9th Cir. 1997).

21
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23 ⁷(...continued)

24 cannot look to a res separate from the general assets of the
25 corporation to satisfy their claims or 2) beneficiaries of the
26 plan have no legal rights greater than those of general,
27 unsecured creditors to the assets of the employer. See, e.g.,
28 Accardi v. IT Litigation Trust (In re IT Group, Inc.), 448 F.3d
661, 668 (3d Cir. 2006); Reliable Home Health Care, Inc. v. Union
Cent. Ins. Co., 295 F.3d 505, 513-14 (5th Cir. 2002); Demery v.
Extebank Deferred Comp. Plan (B), 216 F.3d 283, 287 (2d Cir.
2000); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1214
(8th Cir. 1981).

1 The controversy on appeal concerns the proper application of
2 § 541(b)(7) to top hat plans. Under § 541(b)(7) of the
3 Bankruptcy Code, property of the estate does not include any
4 amount withheld by an employer from the wages of employees for
5 payment as contributions to an employee benefit plan that is
6 subject to title I of ERISA. 11 U.S.C. § 541(b)(7)(A) and (B).
7 Korneff contends that this code section excluded the ING account
8 funds from Downey's bankruptcy estate. He argues that Downey
9 withheld the ING account funds from the wages of its employees
10 pursuant to a deferred compensation plan and that the plan was
11 subject to ERISA. He urges that the bankruptcy court erred when
12 it concluded that "deferring" compensation is something different
13 than having funds "withheld" from one's wages and that Downey's
14 deferred compensation plan was not "subject to" Title I of ERISA.

15 Since § 541(b)(7) was added to the Code in 2005, only a few
16 courts have considered whether that section applies to unfunded
17 top hat plans. Those few courts have uniformly concluded,
18 however, that an agreement to defer income is qualitatively
19 different from the type of "withholding" contemplated in
20 § 541(b)(7)(A)(i)(I). See In re The Colonial BancGroup, Inc.,
21 436 B.R. 695, 711-12 (Bankr. M.D. Ala. 2010); Synovus Trust Co.
22 v. Bill Heard Enters., Inc. (In re Bill Heard Enters., Inc.), 419
23 B.R. 858, 867-68 (Bankr. N.D. Ala. 2009); Schroeder v. New
24 Century Holdings, Inc. (In re New Century Holdings, Inc.), 387
25 B.R. 95, 114 (Bankr. D. Del. 2008).

26 Although declining to decide the issue on a motion to
27 dismiss, the court in New Century Holdings suggested that
28 "withholding" implies that the employee possessed the income at

1 some point while a "deferral" implies an agreement to receive the
2 income in the future with no past or present right to possession.
3 In re New Century Holdings, Inc., 387 B. R. at 114. The Bill
4 Heard Enterprises court reached a similar conclusion, explaining
5 that income is withheld when an employee has a present
6 entitlement to the income, but for some reason the employer
7 declines to give it to the employee. By contrast, an employee
8 deferring compensation has no present entitlement to the income.
9 In re Bill Heard Enters., Inc., 419 B.R. at 867-68.

10 While acknowledging the strength of the distinction between
11 present and future entitlement, the bankruptcy court in Colonial
12 BancGroup found more "organic" problems with excluding the assets
13 of a top hat plan from property of the estate. First, the court
14 pointed out that if § 541(b)(7) is interpreted to exclude assets
15 of an "unfunded" plan from property of the employer's estate,
16 then those assets effectively would be removed from the reach of
17 the employer's general unsecured creditors. That result would be
18 at odds with the structure and purpose of unfunded top hat plans
19 (income tax deferral) which depend on the deferred compensation
20 remaining subject to the claims of unsecured creditors. Colonial
21 BancGroup, 436 B.R. at 712. Second, the plan before that court,
22 like Downey's plan, specifically provided that the participants
23 had no ownership interest in the funds. As a result, removing
24 the plan funds from the estate would not establish ownership in
25 the participants. Because the participants had nothing more than
26 unsecured contractual claims against the estate, excluding the
27 plan assets from the estate would merely reduce the assets
28 available to satisfy the participants' claims. Id.

1 Although none of these decisions is binding, the analysis of
2 each is sensible and persuasive. As a result, we adopt their
3 reasoning and determine that the bankruptcy court correctly found
4 that the funds in the ING account were not "withheld" from wages
5 as required by § 541(b)(7). In light of that determination, it
6 makes no difference whether Downey's deferred compensation plan
7 was "subject to" ERISA.

8
9 **VI. CONCLUSION**

10 Based on the foregoing, even if it were error, the
11 bankruptcy court's decision not to proceed by way of an adversary
12 proceeding was harmless. Additionally, the bankruptcy court
13 correctly determined that the funds from the ING account
14 constitute property of the estate. We AFFIRM the decision of the
15 bankruptcy court.