

DEC 19 2006

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

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

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In re:)	BAP No.	NC-06-1151-BuSPa
)		
DIMAS, LLC,)	Bk. No.	02-51420
)		
Debtor.)		
_____)		
ANDREW LEWIS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
DIMAS, LLC; ADRIENNE RAKITIN;)		
UNITED STATES TRUSTEE,)		
)		
Appellees.)		
_____)		

Argued and Submitted on October 18, 2006
at San Francisco, California

Filed - December 19, 2006

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

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding.

Before: BUFFORD,² SMITH and PAPPAS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Samuel L. Bufford, Bankruptcy Judge for the Central District of California, sitting by designation.

1 **I. INTRODUCTION**

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3 This case involves the scope of a written general release,
4 waiving the protection of Cal. Code Civ. Proc. § 1542, executed by
5 parties to real estate foreclosure litigation. Appellant Andrew
6 Lewis ("Lewis") contends that the release did not discharge property
7 taxes owing by Debtor Dimas, LLC ("Dimas") on the subject property
8 at the time of the release. The bankruptcy court found that the
9 property taxes were within the scope of the release. We agree with
10 the bankruptcy court's decision and affirm.

11
12 **II. RELEVANT FACTS**

13
14 **A. Background**

15
16 Lewis, a sophisticated "hard-money lender," held three deeds of
17 trust on real property owned by Dimas. A subdivision map was
18 approved for subdivision of the parcel into six lots. Meanwhile,
19 Dimas defaulted on the payments to Lewis, and Lewis was afraid that
20 if the subdivision was not completed before the subdivision approval
21 expired, his security in the not-yet-divided property would be
22 substantially lower in value than the six separate subdivision lots.

23 After Dimas filed this chapter 11 bankruptcy case³, Lewis filed
24 a motion for relief from the automatic stay. The parties settled

25
26

³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to
28 the Federal Rules of Bankruptcy procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act
of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 the motion with an agreement giving Dimas thirty days to refinance
2 the property, absent which Lewis was entitled to proceed with
3 foreclosure.

4 Dimas failed to refinance the property and Lewis foreclosed.
5 Lewis purchased the property himself at the foreclosure sale with a
6 single credit bid for the total owing on all three deeds of trust.
7 He then completed subdivision of the property into six lots. In
8 addition, while Lewis held the property, he paid the real property
9 taxes.

10 Dimas filed an adversary proceeding challenging the foreclosure
11 sale. The bankruptcy court ruled that Lewis had no right to merge
12 the three deed of trust obligations into one and to bid the entire
13 amount of the debt at the foreclosure sale on the third deed of
14 trust (the most junior lien). In consequence, the court ordered
15 that Dimas be restored to title to, and possession of, the property
16 subject to the three deeds of trust.

17 Subsequently, the parties mediated their dispute and reached a
18 settlement agreement (the "Agreement") giving Dimas thirty days
19 (from the date of court approval of the settlement) to refinance and
20 to pay \$3.1 million to Lewis. Alternatively, in the event of
21 default, the Agreement authorized Lewis to buy the property from
22 Dimas for \$1.8 million in cash plus the cancellation of the secured
23 debts owing to him. The court approved the Agreement on August 3,
24 2005.

25 The August 3 order was not the end of the negotiations between
26 Lewis and Dimas. The parties submitted an amendment (principally
27 giving Dimas more time to perform), which the court approved on
28 September 14, 2005. In October the parties again amended the

1 Agreement, which amendment the court approved on October 22, 2005.
2 Dimas again failed to pay, and Lewis finally bought the property for
3 \$1.8 million.

4 Dimas did not pay much of the property taxes that accrued
5 during the time that it was restored to possession of the property.
6 When Lewis reacquired the property in October 2005, a total of
7 \$33,923.58 was owing for property taxes for the fiscal year
8 beginning on July 1, 2004. An additional \$5,650.01 was owed for the
9 prorated portion of property taxes for the period from July 1, 2005,
10 to October 27, 2005, the date that Lewis closed his reacquisition.

11 In connection with the October 2005 amendment, Lewis sent Dimas
12 a letter on October 13, 2005, requesting a proration of the property
13 taxes here at issue which would have resulted in the payment of the
14 taxes by Dimas. Dimas declined.⁴

15 After the closing, Lewis filed an administrative claim ("the
16 Claim") for the property taxes in the amount of \$45,000 against the
17 Dimas estate. Dimas objected to the Claim. The bankruptcy court
18 sustained the objection and disallowed the Claim. Lewis appealed.

19

20 **B. The Settlement Agreement**

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22 This appeal turns on the terms of release contained in the
23 Agreement resulting from the mediation, and which was approved by
24 the bankruptcy court in August 2005 (as amended in September and
25 October of that year). That agreement provides in relevant part:

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27 ⁴ While there is no direct evidence that Dimas declined paying
28 the property taxes in October 2005, we infer that it did from the
fact that such payment does not appear in the final version of the
second amendment.

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Each Party herein desires to compromise and release all other Parties from all claims and to otherwise reach a full and final settlement of all such claims arising out of or related to any and all disputes and desire to dispose of all litigation

. . . .

5. Resolution of Claims. The Parties agree that there shall be no further litigation amongst them unless the Court issues a final order denying any form of this Settlement Agreement. . . .

. . . .

7. Release. Except for the obligations created in this Settlement Agreement, each of the Parties . . . hereby release and forever discharge all other Parties . . . whether in the past or present, of and from any and all claims, demands, actions, causes of action, obligations, damages, liabilities, loss, costs or expenses . . . of any kind or nature, whatsoever, past or present, ascertained or unascertained, whether or not now known, suspected or claimed, including but not limited to those claims arising out [sic.] the events or incidents referred to in the claims filed by DIMAS in the Dimas Bankruptcy or the Dimas Adversary Proceeding.

8. Waiver. The Parties hereto expressly waive any rights or benefits available under Section 1542 of the Civil Code of the State of California which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

. . . .

10. Final Settlement. The Parties understand and agree that the releases in this Settlement Agreement shall act as a release of future claims that may arise from the above-mentioned dispute, whether such claims are currently known, unknown, foreseen, or unforeseen. The Parties understand and acknowledge the significance and consequence of the specific waiver of Section 1542 above.

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C. Decision of the Bankruptcy Court

In sustaining Dimas' objection to the Claim, the bankruptcy court decided that the Agreement included the Claim, and that the Claim could no longer be pursued against the bankruptcy estate. The bankruptcy court found that it did not matter whether the Claim was presently known or was a future unknown claim, because the Agreement covered it in either case. In support of its decision, the bankruptcy court cited each of the foregoing provisions in the Agreement.

III. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b) (1). We have jurisdiction under 28 U.S.C. § 158(a) (1).

IV. STANDARDS OF REVIEW

Findings of fact are reviewed on appeal for clear error. See, e.g., Moldo v. Ash (In re Thomas), 428 F.3d 1266, 1268 (9th Cir. 2005). We review de novo a bankruptcy court's grant of summary judgment.⁵ In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1245 (9th Cir. 1997).

⁵ Although the bankruptcy court did not specifically designate the proceeding below a summary judgment hearing, in substance it followed procedures appropriate for summary judgment.

1 **1. California Civil Code § 1542**

2
3 California law protects settling parties from unintended
4 consequences of a written release. California Civil Code § 1542,
5 which is quoted in toto in paragraph 10 of the Agreement, provides,
6 "A general release does not extend to claims which the creditor does
7 not know or suspect to exist in his or her favor at the time of
8 executing the release, which if known by him or her must have
9 materially affected his or her settlement with the debtor."
10 California case law authorizes the waiver of this provision,
11 provided that suitable language is used.
12

13 **2. California Case Law**

14
15 California case law provides that, for commercial transactions,
16 broad language in a release discharges all claims in existence at
17 the time the release is executed. When a claim is known to the
18 releasor at the time of the settlement agreement, broad or "near-
19 global" language is sufficient to cover the claim. See, e.g.
20 Jefferson v. Cal. Dep't of Youth Auth., 48 P.3d 423, 425 (Cal. 2002)
21 (the releasor "release[d] and forever discharge[d] [the Youth
22 Authority] from all claims") (emphasis added); Israel-Curely v. Cal.
23 Fair Plan, 24 Cal. Rptr. 3d 1, 5 (Cal. App. 2005) ("release of 'any
24 and all' claims"); Winet v. Price, 6 Cal. Rptr. 2d 554, 558 (Cal.
25 App. 1992) ("[i]n no fewer than three distinct places [in the
26 release] the parties declared their intention to release each other
27 from *all* claims"). Absent actual fraud, an express waiver of rights
28

1 under § 1542 is valid against a releasor. Pac. Greyhound Lines v.
2 Zane, 160 F.2d 731, 736 (9th Cir. 1947).

3 Section 1542 is based on a policy in favor of enforcing
4 settlement agreements. Initially, § 1542 was enacted to prevent a
5 party from releasing a claim unknown to it at the time of the
6 agreement where, if the party had had knowledge of the claim, its
7 decision to execute the release would have been materially affected.
8 However, California case law holds that the section can be waived
9 by a mere recital in the release. Larsen v. Johannes, 86 Cal. Rptr.
10 744, 749 (Cal. App. 1970); Winet, 6 Cal. Rptr. 2d at 561.

11 In cases involving commercial or business transactions, a waiver
12 of § 1542 in the release is a valid waiver of all future claims,
13 unknown or known. Larsen, 86 Cal. Rptr. at 749; Winet, 6 Cal. Rptr.
14 2d at 561; see generally, 1 WITKIN, SUMMARY OF CALIFORNIA LAW, Contracts
15 § 948(3) (10th ed. 2005) ("a release in [a commercial transaction]
16 is valid under general law.").

17 San Diego Hospice v. County of San Diego involved a claim that
18 was undiscovered at the time of the release. Nevertheless, the court
19 found that specific language in the release covering any undiscovered
20 claims was sufficient to bar a subsequent claim brought by the
21 releasor. The court held that "a general release can be completely
22 enforceable and act as a complete bar to all claims (known or unknown
23 at the time of the release) despite protestations by one of the
24 parties that he did not intend to release certain types of claims."
25 San Diego Hospice v. County of San Diego, 37 Cal. Rptr. 2d 501, 504
26 (Cal. App. 1995) (citing Winet, 6 Cal. Rptr. 2d at 554). Where the
27 releasor is fully informed and expressly waives the protection under
28 § 1542, any subsequent claims brought by the releasor must be

1 disallowed. Jefferson, 48 P.3d at 425; San Diego Hospice, 37 Cal.
2 Rptr. 2d at 505; Winet, 6 Cal. Rptr. 2d at 559.

3
4 **B. Application of § 1542 to this Case**

5
6 Lewis makes three contentions in support of this appeal. First,
7 he contends that the property taxes at issue constituted a future
8 claim, not an existing claim. Second, he contends that paragraph 10
9 is the only provision in the Agreement that applies to future claims.
10 Third, he argues that the unpaid taxes do not fall within the scope
11 of "the above mentioned dispute" phrase in paragraph 10. To prevail
12 on appeal, Lewis must sustain all of these arguments. We are not
13 persuaded.

14
15 **1. Applicable Language in the Agreement**

16 Like the bankruptcy court, we apply contract principles in
17 interpreting the Agreement. In interpreting a contract, we must
18 construe it as a whole, and give effect (if possible) to all of its
19 parts. See CAL. CIV. CODE § 1641 (2006) ("The whole of a contract is
20 to be taken together, so as to give effect to every part, if
21 reasonably practicable, each clause helping to interpret the
22 other."); Insurance Co. of Pa. v. Associated Int'l Ins. Co., 922 F.2d
23 516, 522 (9th Cir. 1990) (same, citing § 1641). The bankruptcy court
24 found that the Agreement, taken as a whole, clearly covers future
25 claims. We agree.

26 We do not agree with Lewis' contention that only paragraph 10
27 applies to future claims. We find that three provisions in the
28 Agreement cover future claims. First, paragraph 5 states, "the

1 Parties agree that there shall be no further litigation amongst them
2 (emphasis added). Second, paragraph 7 states, "the [p]arties
3 . . . hereby release and forever discharge all other parties . . .
4 of and from any and all claims . . . of any kind or nature,
5 whatsoever, past or present, ascertained or unascertained, whether
6 or not now known, suspected or claimed, including but not limited to
7 [certain specified claims]" (emphasis added). Third, paragraph 10
8 states that "[t]he [p]arties understand . . . that the releases in
9 this Settlement Agreement shall act as a release of future claims
10 that may arise from the above-mentioned dispute, whether such claims
11 are currently known, unknown, foreseen, or unforeseen." In addition,
12 the preamble emphasizes this broad interpretation of the Agreement
13 by stating, "[e]ach [p]arty . . . release[s] all other [p]arties from
14 all claims[.]" (emphasis added).

15 More generally, the Agreement contains an express waiver of §
16 1542 in paragraph 8 which provides in part that, "[t]he [p]arties
17 hereto expressly waive any rights or benefits available under Section
18 1542 . . .[.]" (emphasis added). In support of this waiver,
19 paragraph 8 also quotes the entire language of § 1542 to prevent any
20 ambiguity on this subject. Thus, the Agreement unambiguously shows
21 that Lewis knew he was expressly waiving the protection afforded to
22 him by § 1542.

23

24 **2. Future Claim**

25 Because we agree with the bankruptcy court that the Claim is
26 covered by the broad language in the release extending to both
27 present and future claims, we find it unnecessary to decide whether
28

1 the Claim was a future or a known claim at the time that the release
2 was executed and approved by the court.

3 Even if we were required to decide whether the Claim is a future
4 claim, we could not find in favor of Lewis. Most of the taxes here
5 at issue accrued during the fiscal year beginning July 1, 2004 and
6 ending June 30, 2005. Under California law, to avoid penalties, the
7 first half of these taxes had to be paid by December 10, 2004,⁶ and
8 the second half by April 10, 2005.⁷ These taxes predate altogether
9 the first approval of the Agreement by the bankruptcy court. They
10 clearly existed, whether they were known or not, on the date of the
11 first court hearing on the Agreement. The remaining taxes accrued
12 for the period from July 1, 2005, to October 27, 2005, the date of
13 the closing of Lewis' acquisition of the property. These had
14 likewise virtually all accrued when the bankruptcy court approved the
15 second amendment to the Agreement on October 22, 2005.

16 We have substantial doubts that even the 2005-2006 taxes could
17 qualify as a future claim. Under California law, a tax assessment
18 is made annually on all taxable real property. CAL. REV. & TAX CODE
19 § 405(a) (2006); CAL. GOV. CODE § 43002 (2006). Once an assessment is
20 made, a tax lien is placed on the property and the lien is not
21 removed until the taxes are paid. CAL. REV. & TAX CODE § 2187 (2006);
22 City of Long Beach v. Aistrup, 330 P.2d 282, 289 (Cal. App. 1958).
23 The tax lien attaches to the real property on the first day of
24 January of every year for the taxes assessed in the fiscal year
25 beginning July 1 of that year. CAL. REV. & TAX CODE § 2192 (2006). The

26
27 ⁶ See CAL. REV. & TAX CODE § 2617 (West 2006).

28 ⁷ See id. § 2618.

1 tax lien constitutes an encumbrance on the property and it provides
2 security for the payment of the taxes. Aistrup, 330 P.2d at 289.
3 The owner has the obligation to pay in due course the taxes arising
4 on the lien date. Couts v. Cornell, 82 P. 194, 196 (Cal. 1905).

5 In this case, the property taxes were already assessed on the
6 date that the title was restored to Lewis. In consequence, at the
7 time of the Agreement, a tax lien was already on the property for the
8 2005-2006 fiscal year taxes.

9 Furthermore, it appears that Lewis was aware of the unpaid taxes
10 during the negotiations concerning the Agreement and requested that
11 Dimas assume the obligation to pay those taxes. Based on this
12 record, we conclude that the Claim existed at the time Lewis executed
13 the Agreement.

14
15 **VII. CONCLUSION**
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17 For the foregoing reasons, we AFFIRM the decision of the
18 bankruptcy court.
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