NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-06-1230-BPaD
VEC FARMS, LLC,	
Debtor.	Bk. No. 04-56545-JRG
MAINAS FARMS, INC.,	
Appellant,	
v.	**M E M O R A N D U M**[1]
VUKASOVICH TRUST; C&V FARMS; COLENDICH TRUST; JOHN VAN CUREN, Chapter 11 Trustee,	
Appellees.	

Argued and Submitted on November 17, 2006
at San Jose, California

Filed - December 22, 2006

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

Honorable James R. Grube, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS and DUNN, Bankruptcy Judges.

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

Appellees Vukasovich Trust, C&V Farms, and Colendich Trust ("Affiliates") paid off debtor's obligations to creditor FO-Farmer's Outlet, Inc., after pledging their real property as security for a post-petition settlement of two state court collection actions. Affiliates were not parties to that litigation. Over the objection of the estate's largest creditor, Mainas Farms, Inc., the bankruptcy court granted Affiliates' motion for subrogation. Mainas appeals, arguing that the provider of security must have done so at the same time as the debtor incurred the obligation to be entitled to subrogation under § 509(a).[2]

We AFFIRM.

I. FACTS

The debtor, VEC Farms, is a limited liability company which was in the business of growing and selling vegetables. Its members are Echo Crop Investment, Inc., and Domingo Agricultural Services, Inc., both California corporations. Echo's principals are John Colendich and Martin Vukasovich; Domingo is wholly owned by Richard Escamilla.

FO-Farmer's Outlet, Inc., supplied VEC's packaging materials. By February 2003 VEC had fallen behind in paying FO, and had accumulated outstanding delinquent invoices totaling $466,648.61. To resolve the delinquency, VEC, Escamilla, John Colendich, Martin Colendich (John's father), Martin Vukasovich, and Virginia Vukasovich (Martin's mother) executed an unsecured promissory note payable to FO in that amount on 24 February 2003.

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[2] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before its effective date (generally 17 October 2005).

VEC again fell behind, owing an additional $1,036,313.24. VEC, John Colendich, Richard Escamilla, and Martin Vukasovich executed another promissory note in that amount on 20 January 2004.

On 20 September 2004, FO filed a lawsuit in superior court in Imperial County, California, to collect on the January 2004 note. VEC filed its chapter 11 petition on 21 October 2004. Shortly thereafter, FO filed a second lawsuit in the same court to collect on the February 2003 note. VEC was not a named defendant in the latter action.

John Van Curen was appointed VEC's chapter 11 trustee on 19 November 2004.

On 10 March 2005, the parties in both lawsuits, including Affiliates but not VEC, entered into an agreement to pay FO $2,941,265.40 in full settlement of FO's claims against them, executing two promissory notes secured by deeds of trust on real property owned by Affiliates.

The settlement agreement provides:

> The parties acknowledge that Defendants Martin Colendich and Virginia Vukasovich and the Defendants' Affiliates are liable under this Agreement and the Promissory Notes only as to the pledge of the Real Property as collateral securing the obligations set forth herein and shall not be liable for any further amount or obligation.

Exhibit A to Declaration of Effie Anastassiou, 14 November 2005. (emphasis added). Paragraph 2.2 of the agreement provided for entry of a stipulated judgment in the event FO was not paid as agreed; it is not in the record provided to us.

Affiliates moved for a determination that they were statutorily and equitably subrogated to FO's claim in VEC's bankruptcy case. FO and the chapter 11 trustee opposed. The bankruptcy court rejected Affiliates' argument that the promissory notes satisfied the obligation, and denied

subrogation because FO's claim had not been paid in full. Transcript, 21 December 2005, pages 2-6.

Thereafter Affiliates paid off the promissory notes and renewed their request for subrogation under § 509. Mainas opposed, arguing that the provider of security must have done so at the same time as the debtor incurred the obligation to be entitled to subrogation under § 509(a). The trustee also opposed, deferring on substantive arguments to Mainas, and requesting language in any order granting the motion providing that it would not impair or prejudice any objections to FO's claim or the trustee's pending adversary proceeding against Affiliates or other insiders. The bankruptcy court granted the renewed motion because Affiliates had secured the claim with their property, transcript, 25 May 2006, pages 6-9, entering an order which Mainas timely appealed. The order includes the language the trustee requested; although named as an appellee, he has not participated in this appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(A) and (O), and we do under 28 U.S.C. § 158(c).

III. ISSUE

Whether the bankruptcy court erred in granting Affiliates' motion for subrogation under § 509(a).

IV. STANDARDS OF REVIEW

We review issues of statutory construction and conclusions of law, including interpretation of the Bankruptcy Code, de novo. In re Tran, 309 B.R. 330, 333 (9th Cir. BAP 2004), aff'd, 177 Fed. Appx. 754 (9th Cir. 2006).

The question of whether subrogation was appropriate in these circumstances presents a mixed question of law and fact. A mixed question occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997)(citations omitted). We also review mixed questions de novo. Id.

V. DISCUSSION

"[S]ubrogation is the substitution of one party in place of another with reference to a lawful claim, demand or right," In re Hamada, 291 F.3d 645, 649 (9th Cir. 2002), and may be contractual, equitable, or statutory. Id. This appeal is limited to the issue of appellees' statutory subrogation rights under § 509.

Section 509(a) provides, in relevant part:

> [A]n entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

(emphasis added).

Under this provision, there are two ways to qualify for subrogation: by being liable with the debtor on a claim of a creditor and paying it, or by securing a claim and paying it. In re Slamans, 69 F.3d 468, 473 (10th Cir. 1995). The parties do not dispute that Affiliates were never "liable with" the debtor on its obligation to FO, although some of

Affiliates' principals were. Rather, Mainas contends the bankruptcy court erred in concluding that securing FO's claim against debtor with their real property entitled Affiliates to subrogation.

Affiliates complain that the timing argument was not raised in the bankruptcy court. While we do not ordinarily consider arguments raised for the first time on appeal, we may exercise our discretion to do so if the issue is purely one of law and the factual record has been completely developed. In re Wheatfield Business Park, LLC, 308 B.R. 463, 466 (9th Cir. BAP 2004); see also In re America West Airlines, Inc., 217 F.3d 1161, 1165 (9th Cir. 2000). Here, the facts are undisputed, the issue is one of law, review is de novo, and Affiliates do not argue that they are prejudiced by having to respond to the argument. Accordingly, we will consider it.

There is very little case law addressing the provision of security as a basis for subrogation, and virtually none with facts analogous to those presented here. Some of the cases involve letters of credit; because of the "independence principle," letters of credit generally do not entitle the paying party to subrogation under the secured prong of § 509(a). Hamada, 291 F.3d at 650 (a bank's obligation under a letter of credit is independent of the underlying contract); see also In re Carley Capital Group, 119 B.R. 646, 648-49 (W.D. Wis. 1990) ("[a] letter of credit is an independent and primary obligation of the issuer to the beneficiary and is not the 'pledge' of any asset"); In re Valley Vue Joint Venture, 123 B.R. 199, 204 n.10 (Bankr. E.D. Va. 1991) (notwithstanding general usage that a letter of credit "secures" an obligation, § 509(a) refers to the granting of a security interest in an asset).

These cases shed little light on the appeal before us. But we are to construe a statute according to its plain meaning, U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). Under that maxim, the bankruptcy court did not err in granting Affiliates' motion for subrogation: they secured FO's claim against debtor and then paid it.

Appellant cites 4 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 509.02[2] (15th ed. rev. 2006), which states "[A]n independent ground of subrogation is available under section 509(a) to an entity who has granted a security interest in its own property as collateral to secure repayment by the debtor." (emphasis added). Appellant's logic is that if the security interest was granted to secure payment by the debtor, it must have been granted at the time the debt was incurred. Appellant cites In re Daley, 222 B.R. 44, 47 (Bankr. S.D.N.Y. 1998), for the proposition that "'liable with' means that the parties are liable to the same creditor at the same time on the same debt" (emphasis added), and argues that this reasoning applies by analogy to the "secured" prong of § 509(a).

There is no requirement under the Code or case law that the security be pledged when the debt was incurred. Appellant has articulated no policy reason why such a requirement should be imposed, instead arguing from what it asserts is the parallel construction of the two clauses of § 509(a) that simultaneity is also a requirement under the provision of security rubric. But the clauses of § 509(a), "is liable with the debtor on, or that has secured . . . ," are not parallel: "is" is present tense, and "with" implies a joint obligation, while "has secured" refers to a past event, and there is nothing implying jointness.

And while the settlement agreement and promissory notes do not explicitly state that the obligation being paid was that of the debtor,

it is clear from the record that it was, and the bankruptcy court so found. Transcript, 25 May 2006, at 8. Appellant contends that Affiliates granted the security to secure their own obligations under the settlement agreement, but as noted, the agreement expressly relieves Affiliates of personal liability for the debt. Appellant argues, without elaboration, that the notes and stipulated judgment should trump the provision in the settlement agreement. The bankruptcy court made no finding on this point, but multiple documents that are part of the same contract are construed together. Cal. Code Civ. Proc. § 1642; Nish Noroian Farms v. Agricultural Labor Relations Bd., 35 Cal. 3d 726, 735, 677 P.2d 1170, 1175 (1984). Interpreting the agreement in light of this principle, it would appear that the Affiliates were not personally liable. At least, there has been no finding that the parties intended otherwise. See ASP Props. Group v. Fard, Inc., 133 Cal. App. 4th 1257, 1269, 35 Cal. Rptr. 3d 343, 351 (2005).

Appellant further contends that Affiliates are not entitled to subrogation because they secured and paid the debt voluntarily. This argument might have merit were Affiliates seeking subrogation under California law, which requires, among other things, that the subrogee must not have acted as a volunteer. Caito v. United California Bank, 20 Cal. 3d 694, 704, 576 P.2d 466, 471 (1978). Affiliates argue that they did not pay the debt voluntarily — were it not for the settlement, Affiliates would have been joined as parties in the state court litigation, and were named as "Doe" defendants in the stipulated judgment.

We need not reach the question, because Affiliates sought subrogation pursuant to § 509, which does not bar volunteers. Statutory and equitable subrogation rights are distinct; a party asserting

subrogation rights may proceed under either theory. See In re Spirtos, 103 B.R. 240, 245 (Bankr. C.D. Cal. 1989); In re The Medicine Shoppe, 210 B.R. 310, 313 (Bankr. N.D. Ill. 1997); and In re Southwest Equipment Rental, Inc., 193 B.R. 276, 283 (E.D. Tenn. 1996). Other courts hold that an alleged subrogee must satisfy both the statutory and equitable requirements. In re Kaiser Steel Corp., 89 B.R. 150, 152 (Bankr. D. Colo. 1988); In re Rose, 139 B.R. 878, 882 (Bankr. W.D. Tenn. 1992).

We find the Spirtos interpretation better reasoned: had Congress intended to codify equitable subrogation rights in § 509, it could have done so explicitly, but it did not. Nothing in the statute's plain language indicates any further requirement for subrogation beyond providing security for a debtor's obligation and payment of that obligation. And Congress knows how to import predicate requirements into the Code: see § 510(c)(1), which provides for subordinating a claim "under principles of equitable subordination." In contrast, an entity which meets the express requirements of § 509 "is subrogated."

Finally, subrogation in these circumstances is not inequitable. As the bankruptcy court observed, there is no indication that subrogating the claim diminishes or alters the distribution to other creditors of the estate. The estate would be required to pay FO's claim had Affiliates not done so. Transcript, 25 May 2006, page 9. In any event, subordination is available under § 510 if Appellant has grounds.

VI. CONCLUSION

Appellant has not shown that the bankruptcy court erred in granting Affiliates' motion for subrogation. We AFFIRM.