

MAY 06 2013

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. 12-1363-MoMkTa
)
KARYKEION, INC.,) Bk. No. 08-bk-17254-MT
)
Debtor.) Adv. No. 12-ap-01047-MT
_____)

MITCHELL RUBIN, in his)
)
capacity as President of the)
Debtor and Debtor in)
Possession, on behalf of)
KARYKEION, INC., a California)
corporation, Debtor, and on)
Behalf of Beneficial Equity)
Holder Edward Rubin, M.D.,)
)
Appellant,)

v.)

MEMORANDUM¹

CHHP HOLDINGS II, LLC;)
)
CALIFORNIA DEPARTMENT OF)
PUBLIC HEALTH; UNITED STATES)
OF AMERICA, on behalf of the)
Department of Health & Human)
Services, and its designated)
component, the Centers for)
Medicare and Medicaid,)
)
Appellees.)
_____)

Argued and Submitted on February 21, 2013
at Pasadena, California

Filed - May 6, 2013

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Before: MONTALI,² MARKELL and TAYLOR, Bankruptcy Judges.
2

3 A chapter 11³ debtor sold a hospital pursuant to an asset
4 purchase agreement approved by the bankruptcy court. The
5 debtor's president thereafter sued the purchaser and others,
6 alleging that the purchaser had assumed liability for the
7 debtor's unpaid payroll taxes. The purchaser (joined by other
8 defendants) moved to dismiss the complaint for failure to state a
9 claim, arguing that it was not liable for these taxes under the
10 unambiguous terms of the asset purchase agreement. The
11 bankruptcy court agreed and dismissed the complaint with
12 prejudice. We AFFIRM.
13

14 I. FACTS

15 Karykeion, Inc. ("Debtor") filed its chapter 11 petition on
16 September 22, 2008. Appellant Mitchell Rubin ("Plaintiff") is
17 the president of Debtor. As of the petition date, Debtor owed
18 the Internal Revenue Service ("IRS") approximately \$3,945,000 for
19 unpaid payroll taxes (the "IRS Taxes").

20 Debtor operated Community Hospital of Huntington Park,
21 California (the "Hospital") until it was sold to appellee CHHP
22 Holdings II, LLC ("CHHP") pursuant to an Asset Purchase Agreement
23 ("APA"). The bankruptcy court approved the APA in an order
24 authorizing the sale of the Hospital and related assets entered
25

26 ² Hon. Dennis Montali, Bankruptcy Judge for the Northern
District of California, sitting by designation.

27 ³ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 on March 23, 2010. The transfer of the Hospital was embodied in
2 the APA and an Interim Management Agreement ("IMA").

3 The APA provided that CHHP, at its sole discretion, would
4 assume specific executory contract obligations:

5 2.3 *Assigned and Subleased Contracts.* Subject to the
6 terms set forth in this Agreement and the General
7 Assignment, within thirty (30) days of the Closing Date
8 and effective as of the Cut-Off Time, Seller shall
9 (a) assign to Purchaser, and Purchaser shall assume,
10 the executory contractual obligations of Seller under
11 the specific Contracts that Purchaser elects, in the
12 exercise of its sole discretion, to assume on the
13 Closing Date (the "*Assigned Contracts*"), all of which
14 shall be expressly identified and included on
15 Schedule 2.3 No Contract shall be considered an
16 Assigned Contract unless it is expressly identified and
17 included on Schedule 2.3, at the election of Purchaser
18 (in its sole discretion) as provided herein.

12 * * *

13 3.4 *Assumed Obligations.* Subject to the terms set
14 forth in this Agreement, at Closing, Purchaser shall
15 assume, pay, perform and discharge each of the
16 following (the "*Assumed Obligations*"):

16 (a) all executory contractual obligations under the
17 Assigned Contracts which arise after the Closing Date,
18 plus any Cure Payments paid by Purchaser on the Closing
19 Date in connection with the assignment of the Assigned
20 Contracts Note (which Cure Payments shall be offset
21 against the Purchaser Note pursuant to
22 Section 3.2(d))[.]

20 APA at pages 14-15 and 16. Schedule 2.3 of the APA, in turn, has
21 an entry identifying "Internal Revenue Service - PR" as a
22 "vendor," and "agency" as the "department or service."

23 The APA also identified liabilities which would be retained
24 by Debtor, including taxes assessed prior to execution of the
25 agreement:

1 3.5 *Retained Liabilities*. Seller [Debtor] shall
2 retain, pay, perform and discharge all Liabilities
3 arising out of or relating to the ownership or
4 operation of the Hospital, Mission Hospital, the
5 Business and the Acquired Assets on or prior to the
Closing Date, other than Liabilities that are expressly
included among the Assumed Obligations (the "*Retained
Liabilities*"), including all Liabilities arising out of
or relating to any of the following

6 (I) any Taxes assessed as a result of Seller's
7 ownership or operation of the Hospital, Mission
8 Hospital, the Business or the Acquired Assets on or
prior to this Agreement;

9 APA at pages 16-17 (emphasis added.)

10 Approximately two years after the bankruptcy court approved
11 the sale and APA, Plaintiff -- purportedly acting on behalf of
12 Debtor -- sued CHHP, the U.S. Department of Health and Human
13 Services and its designated operating division, the Centers for
14 Medicare & Medicaid Services (collectively, "HHS"), as well as
15 various state government departments and agencies. Plaintiff
16 sought a declaratory judgment that (among other things) CHHP is
17 liable (as successor and by contract) for the IRS Taxes; he also
18 alleged that no transfer of the Hospital had occurred because
19 form CMS 855 (i.e., a Change of Ownership ("CHOW") form) had not
20 been executed. He also asserted claims for conversion,
21 misrepresentation, specific performance, injunctive relief, and
22 accounting; all of these claims were based on the premise that
23 CHHP was liable for the IRS Taxes.

24 CHHP and HHS each filed motions to dismiss (with HHS also
25 joining CHHP's motion) Plaintiff's amended complaint ("Amended
26 Complaint"), contending that the APA unambiguously did not impose
27 liability for the IRS Taxes on CHHP, that Plaintiff lacked
28 standing to bring the claims on behalf of Debtor, that the court

1 lacked jurisdiction to determine Medicare-related issues, and
2 that only the IRS can assert successor liability with respect to
3 tax debts. Only one of these issues is the subject of this
4 appeal: whether the APA imposed liability for the IRS Taxes on
5 CHHP.

6 Prior to the hearing on the motions to dismiss, the court
7 issued a tentative ruling indicating its intent to grant them.
8 The court concluded that no ambiguity existed in the APA, and
9 that CHHP did not assume liability for the IRS Taxes:

10 The relevant provisions of the APA must be read
11 together. California Civil Code § 1641. . . . [W]hether
12 the contract is ambiguous can be decided from the
13 language of the contract as a matter of law.
14 *In re Ankeny*, 184 B.R. 64, 70 (9th Cir. BAP
15 1995). . . .

16 The relevant provisions of the APA then provide a
17 roadmap as to why CHHP did not agree to assume the
18 payroll tax liability. Paragraph 2.3 provides that no
19 contract "shall be considered an Assigned Contract
20 unless it is expressly identified and included on
21 Schedule 2.3, at the election of the Purchaser (in its
22 sole discretion) as provided herein." Schedule 2.3 the
23 [sic] includes an entry "Internal Revenue Service-PR."
24 Paragraph 3.4 then provides that "Purchaser shall
25 assume, pay, perform and discharge each of the
26 following (the "Assumed Obligations"):

27 (a) all executory contractual obligations under the
28 Assigned Contracts which arise after the Closing date,
plus any Cure Payments paid by Purchaser on the Closing
date in connection with the assignment of the assigned
contracts[.]

Paragraph 3.5 then describes the "Retained Liabilities"
stating that the Seller [i.e., Debtor] will retain
"(i) any taxes assessed as a result of Seller's
ownership or operation of the Hospital, Mission
Hospital, the Business or the acquitted Assets on or
prior to this Agreement[.]"

The Court agrees with CHHP that when read together, the
relevant provisions of the APA make it clear that CHHP
is not responsible for the payroll taxes. Plaintiff
relies heavily on the "Internal Revenue Service-PR"
entry on Schedule 2.3, and argues that this causes the

1 entire contract to be ambiguous. This ignores the fact
2 that debtor's obligation to the IRS for pre-Closing
3 date taxes was not a "contract." Paragraph 2.3 of the
4 APA also gave CHHP sole discretion as to what contracts
5 it would assume, and there is no indication or
6 allegation it assumed this one. Paragraph 3.4 of the
7 APA provides that [D]ebtor would assume the cost on any
8 contract CHHP did assume. Most importantly,
9 paragraph 3.5(i) of the APA specifically provides for
10 the liability for all taxes related to pre-closing
11 operations was to remain with [D]ebtor.

12 The debtor's argument simply ignores plain language of
13 the APA and reads an ambiguity into the APA where there
14 is none.

15 Notice of Tentative Ruling re Motion to Dismiss Adversary
16 Complaint at pages 6-7.

17 At the hearing, the court adhered to its tentative ruling,
18 calling the argument of Plaintiff "preposterous." Transcript of
19 Hearing held on June 20, 2012, at 24:7. It dismissed the action
20 with prejudice, not wanting "to run up costs further. They've
21 been unnecessarily run up in this case as it is with issues that
22 didn't have merit." Id. at 24:5:11. The court thereafter filed
23 its tentative ruling as its decision, and entered its order
24 dismissing the amended complaint and adversary proceeding on
25 July 6, 2012.

26 Plaintiff filed a timely notice of appeal on July 13, 2012.

27 **II. ISSUE**

28 Did the bankruptcy court err in dismissing the Amended
Complaint without leave to amend?

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C.
§ 157(b)(2)(N) and § 1334. Bankruptcy courts have core

1 jurisdiction to approve sales of estate property under 28 U.S.C.
2 § 157(b)(2)(N) (“[C]ore proceedings include . . . orders
3 approving the sale of property.”). They have corollary
4 jurisdiction to interpret and enforce their own orders carrying
5 out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a).
6 As this adversary proceeding turned on the interpretation of
7 agreements approved by and incorporated into a section 363 sale
8 order, it was a core matter.⁴ Jamaica Shipping Co., Ltd. v.
9 Orient Shipping Rotterdam, B.V. (In re Millenium Seacarriers,
10 Inc.), 458 F.3d 92, 95 (2d Cir. 2006) (holding that an adversary
11 action which turned on the terms of a sale order was a core
12 proceeding); see also HHI FormTech, LLC v. Magna Powertrain USA,
13 Inc. (In re FormTech Indus., LLC), 439 B.R. 352 (Bankr. D. Del.
14 2010) (“[e]nforcement and interpretation of orders issued in core
15 proceedings are also considered core proceedings within the
16 bankruptcy court's jurisdiction”), citing Travelers Indem. Co. v.
17 Bailey, 557 U.S. 137, 138 (2009) (holding that “the Bankruptcy
18 Court plainly had jurisdiction to interpret and enforce its own
19 prior orders”).

20 We have jurisdiction under 28 U.S.C. § 158, as the order
21 dismissing the adversary proceeding with prejudice is a final
22 decision of the bankruptcy court.

24 IV. STANDARDS OF REVIEW

25 We review de novo the bankruptcy court's order granting a
26 motion to dismiss for failure to state a claim under Federal Rule

27
28 ⁴ Plaintiff conceded the core nature of the lawsuit in
paragraph 12 of his Amended Complaint.

1 of Civil Procedure 12(b)(6) (incorporated by Rule 7012).
2 Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th
3 Cir. 2012)(en banc); N. Slope Borough v. Rogstad (In re Rogstad),
4 126 F.3d 1224, 1228 (9th Cir. 1997). We also review de novo the
5 bankruptcy court's dismissal of a complaint without leave to
6 amend. Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,
7 416 F.3d 940, 946 (9th Cir. 2005) ("The district court's
8 dismissal of a complaint without leave to amend is reviewed de
9 novo and is improper unless it is clear that the complaint could
10 not be saved by any amendment."). Under de novo review, we look
11 at the matter anew, as if it had not been heard before, and as if
12 no decision had been rendered previously, giving no deference to
13 the bankruptcy court's determinations. Freeman v. DirectTV, Inc.,
14 457 F.3d 1001, 1004 (9th Cir. 2006).

15 16 V. DISCUSSION

17 To survive a motion to dismiss under Rule 12(b)(6), "a
18 complaint must contain sufficient factual matter, accepted as
19 true, to 'state a claim to relief that is plausible on its
20 face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), quoting Bell
21 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A court should
22 assume the veracity of the factual allegations "and then
23 determine whether they plausibly give rise to an entitlement of
24 relief." Iqbal, 556 U.S. at 679. This plausibility standard is
25 not a probability requirement, but does ask for more than mere
26 possibility; if a complaint pleads facts "merely consistent with"
27 a theory of liability, it falls short of "the line between
28 possibility and plausibility." Iqbal, 129 U.S. at 678 (quoting

1 Twombly, 550 U.S. at 557).

2 Here, the allegations of Plaintiff's complaint that the APA
3 imposed liability for payment of the IRS taxes on CHHP have not
4 crossed the line from merely possible to plausible. Rather, as
5 discussed below, Plaintiff concocts an ambiguity where none
6 exists. The bankruptcy court consequently did not err in
7 dismissing the Amended Complaint. See Twombly, 550 U.S. at 570.

8 This appeal centers on the interpretation of the APA.
9 Plaintiff contends that, at a minimum, the APA's language
10 identifying "Internal Revenue Service -- PR" as an assumed
11 contract renders it ambiguous, thus requiring the introduction of
12 extrinsic evidence to aid in its interpretation. Plaintiff
13 therefore argues that the bankruptcy court erred by not giving
14 him an opportunity to conduct discovery and amend his complaint
15 again.

16 Under Ninth Circuit authority, a party's assertion of
17 ambiguity of contract does not require a court to allow
18 additional opportunities to find or present extrinsic evidence if
19 the court has concluded that the language is *reasonably*
20 susceptible to only one interpretation. Skilstaf, Inc. v. CVS
21 Caremark Corp., 669 F.3d 1005, 1017-18 (9th Cir. 2012) (applying
22 California law) (plaintiff was not entitled to discovery of
23 additional extrinsic evidence to prove ambiguity of settlement
24 agreement reached in prior action). Such a conclusion can be
25 reached in the context of a Rule 12(b)(6) motion to dismiss. Id.

26 Here, the bankruptcy court held that the APA was not
27 ambiguous and was reasonably susceptible to only one
28 interpretation. We agree. Paragraph 3.4 of the APA clearly

1 imposes liability for the IRS Taxes on the Debtor as the seller:
2 "[Debtor] shall retain, pay, perform and discharge all
3 Liabilities arising out of or relating to the ownership or
4 operation of the Hospital . . . including all Liabilities arising
5 out of or relating to . . . any Taxes assessed as a result of
6 Seller's ownership or operation of the Hospital, Mission
7 Hospital, the Business or the Acquired Assets on or prior to this
8 Agreement[.]" Plaintiff's argument that Schedule 2.3 somehow
9 renders this clear and explicit provision ambiguous is
10 unavailing. Skilstaf, 669 F.3d at 1017, quoting Hervey v.
11 Mercury Cas. Co., 185 Cal. App. 4th 954, 961, 110 Cal. Rptr. 3d
12 890, 895 (2010) ("Although parol evidence may be admissible to
13 determine whether the terms of a contract are ambiguous, it is
14 not admissible if it contradicts a clear and explicit [contract]
15 provision.").

16 While Paragraph 2.3 provides that executory contractual
17 obligations identified in Schedule 2.3 would be assumed by CHHP,
18 and "Internal Revenue Service - PR" is identified on
19 Schedule 2.3, Paragraph 3.4 provides that CHHP would pay all such
20 executory contractual obligations "which arise after the Closing
21 Date" plus any cure amounts which would be deducted from the
22 purchase price. The IRS Taxes arose before the Closing Date, and
23 the IRS Taxes did not arise from an executory contract which can
24 be assigned and assumed. A contract is executory, and therefore
25 assumable under section 365, only if one party's failure to
26 perform its obligation would excuse the other party's
27 performance. Zurich Am. Ins. Co v. Int'l Fibercom, Inc.
28 (In re Int'l Fibercom, Inc.), 503 F.3d 933, 941 (9th Cir. 2007),

1 citing Commercial Union Ins. Co. v. Texscan Corp. (In re Texscan
2 Corp.), 976 F.2d 1269, 1272 (9th Cir. 1992); Pac. Express, Inc.
3 v. Teknekron Infoswitch Corp. (In re Pac. Express, Inc.),
4 780 F.2d 1482, 1487 (9th Cir. 1986) (quoting Vern Countryman,
5 Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439,
6 460 (1973)). The IRS owed no duty to perform vis-a-vis the IRS
7 Taxes; it had no contractual obligation that could be breached.
8 The IRS Taxes did not arise because of a contract with the IRS;
9 they are statutory tax obligations. In any event, even if CHHP
10 did "cure" any purported default, that amount would have to be
11 credited against the purchase price.

12 As all of the remaining causes of action in the Amended
13 Complaint (i.e., the first claim for declaratory relief, the
14 second claim for conversion, the third claim for
15 misrepresentation, and the fourth claim for misrepresentation)⁵
16 are dependent on an interpretation of the APA that both the
17 bankruptcy court and we reject, the bankruptcy court did not err
18 in dismissing the Amended Complaint. Furthermore, given that the
19 APA on its face is not susceptible to the interpretation urged by
20 Plaintiff, no ambiguity exists and no extrinsic evidence is
21 required. Consequently, the bankruptcy court did not err in
22 dismissing the adversary proceeding with prejudice.

23
24 ⁵ In his Opening Brief (page 3), Plaintiff formally
25 abandoned the fifth cause of action for injunctive relief. In
26 addition, Plaintiff did not address the bankruptcy court's
27 dismissal of his sixth claim (for accounting) in his opening
28 brief or his reply brief. The bankruptcy court held that the
claim was barred under the doctrine of issue or claim preclusion,
and Plaintiff did not identify or discuss any error in that
holding. As such, the sixth claim is deemed abandoned. See
Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP
1998), aff'd, 205 F.3d 1350 (9th Cir. 1999).

1 **VI. CONCLUSION**

2 The bankruptcy court did not err in holding that the APA was
3 not reasonably susceptible to the interpretation encouraged by
4 Plaintiff and in dismissing the adversary proceeding without
5 allowing Plaintiff to conduct further discovery to look for
6 potential extrinsic evidence that would support his purported
7 interpretation. Therefore, for the foregoing reasons, we AFFIRM.

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