NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-06-1024-DBPa
AB LIQUIDATING CORP.,	Bk. No. 01-53685-ASW
Debtor.	Adv. No. 05-05553-ASW
CGO INVESTMENTS, LLC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
AB LIQUIDATING CORP.,	
Appellee.	

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 Arthur S. Weissbrodt, Bankruptcy Judge, Presiding.

Before: DUNN, BRANDT and PAPPAS, Bankruptcy Judges.

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[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.

This is an interlocutory appeal in which CGO Investments, LLC ("CGO") appeals an order denying: (1) its motion for summary judgment on its request for declaratory relief as to its right to collect a damages claim against the debtor, AB Liquidating Corp. ("AB"); and (2) its application for a writ of attachment against the assets of AB.

For the reasons set forth below, we AFFIRM the bankruptcy court's ruling.

I. Facts

A. AMB's Claim

On April 17, 2000, AMB Property, L.P. ("AMB"), as landlord, and AB, as tenant, entered into a five-year lease for certain commercial property. Pursuant to the lease, AB tendered to AMB a $1 million security deposit in the form of a letter of credit.

On July 26, 2001, AB filed for bankruptcy relief under chapter 11.[2] On August 31, 2001, AB rejected the lease pursuant to § 365(a).

AMB alleged that it suffered approximately $5.6 million in damages from the termination of the lease. On November 2, 2001, AMB filed a proof of claim in the AB bankruptcy case for approximately $2 million in damages, which, it asserted,

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

represented the maximum amount allowable under § 502(b)(6)(i.e., the capped portion of its lease termination damages claim). AMB did not file a claim for the balance of its alleged damages (i.e., the uncapped portion of its lease termination damages claim).

On June 3, 2002, the official creditors' committee filed an objection to the proof of claim, arguing that AMB should apply the proceeds of the letter of credit against the capped portion of the lease termination damages claim. The bankruptcy court agreed, sustaining the objection, and ultimately was affirmed by the Ninth Circuit in AMB Property, L.P. v. Official Creditors for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.), 416 F.3d 961 (9th Cir. 2005).

B. AB's Chapter 11 Plan

On January 18, 2002, AB filed its first amended chapter 11 plan (the "plan"). The plan was a liquidating plan. The plan proposed distributions to creditors out of a fund generated from proceeds from the sale of substantially all of AB's assets, any recoveries from litigation, and any cash on hand as of the effective date of the plan (the "plan proceeds"). Declaration of Robert A. Franklin in Support of Memorandum of Points and Authorities in Opposition to Motion for Partial Summary Judgment ("Franklin Declaration"), Exh. B, First Amended Plan of

Reorganization ("Amended Plan")[3], 9:1.51, 16:5.2, 17:5.4. Upon the effective date of the plan, the plan proceeds would be free and clear of all claims and liens. Amended Plan, 16-17:5.2, 29:8.2-8.3. AB, as the disbursing agent under the plan, was to hold the plan proceeds in trust and, starting on the effective date of the plan, "[was] authorized and directed to distribute the amounts required under the Plan to the holders of Allowed Claims and Interests according to the provisions of the Plan." Amended Plan, 5:1.29, 16:5.2, 17:5.4, 18:5.6.

The plan defined allowed claims and allowed interests as those claims or interests listed in the schedules as undisputed, noncontingent or liquidated; those claims or interests for which a timely proof of claim had been filed and no objection raised; and those claims or interests allowed by a final order, under the plan or under any agreements entered into in connection with the plan. Amended Plan, 3:1.3.1-1.3.3.

The plan provided for payment of allowed unsecured claims after the payment of allowed administrative claims, allowed secured claims, and allowed priority tax and employee claims. Amended Plan, 12:3.1, 13:3.3-4.1, 14:4.2-4.3. After payment in full of all allowed claims and plan expenses and the establishment of reserve funds for disputed claims and interests

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[3] The first amended disclosure statement, the first amended plan, and the order confirming the first amended plan were not filed as separate documents in the adversary proceeding. The Franklin Declaration attaches these documents as Exhibit A, Exhibit B, and Exhibit C, respectively. Henceforth, we refer to these documents by shortened names, designated herein.

and plan expenses, "[e]ach holder of an Allowed Interest shall receive such Holder's pro rata share of the Residue [i.e., the remaining plan proceeds], if any . . .." Amended Plan, 15:4.4, 23:5.11.8.

The plan further provided that, upon the effective date, all of AB's debts would be deemed fixed and adjusted pursuant to the plan. Amended Plan, 18:5.6, 28:8.1. AB would have no further liability on account of any claims or interests, except as set forth in the plan. Amended Plan, 18:5.6. Also, "[e]xcept as otherwise expressly provided in [the] Confirmation Order or the Plan, and except in connection with the enforcement of the terms of the Plan or any documents provided for or contemplated in the Plan, all [claimants and interest holders] who have held, hold or may hold Claims against or Interests in [AB] . . . that arose prior to the Effective Date are permanently enjoined" from commencing or continuing any action or proceeding against AB or its property, with respect to their claims or interests. Franklin Declaration, Exh. C, Order Confirming First Amended Plan of Reorganization ("Confirmation Order"), 18:R; Amended Plan, 29-30:8.5. However, nothing in the plan provided or allowed for a discharge of AB. Amended Plan, 18:5.6; Confirmation Order, 11:C.

Upon the effective date of the plan, all property of the estate, including the plan proceeds, was to revest in and be retained by AB for the purposes set forth in the plan. Amended Plan, 29:8.2.

Upon confirmation, the "provisions of the confirmed Plan

shall bind the Debtor, the Reorganized Debtor, any entity acquiring property under the Plan, and any Creditor or Interest Holder, whether or not such Creditor or Interest Holder has filed a proof of Claim or Interest in the Chapter 11 Case, whether or not the Claim of such Creditor or the Interest of such Interest Holder is impaired under the Plan, and whether or not such Creditor or Interest Holder has accepted or rejected the Plan." Amended Plan, 28:8.1; Confirmation Order, 11:B.

AMB did not object to the plan and voted to accept the plan. On February 28, 2002, the bankruptcy court entered an order confirming the plan. On or about March 3, 2002, the plan became binding and effective. AMB did not appeal the confirmation order.

Sometime after confirmation of the plan, AB paid AMB the allowed capped portion of its lease termination damages claim in full. On or about October 7, 2005, AMB transferred its rights and interests under the lease to CGO, including the uncapped portion of its lease termination damages claim.

C. CGO's Motion for Partial Summary Judgment

On October 28, 2005, CGO filed an adversary complaint against AB, seeking, among other claims, declaratory relief as to its right to collect the uncapped portion of AMB's lease termination damages claim and the issuance of a writ of attachment against the undistributed plan proceeds. On November 3, 2005, CGO moved for partial summary judgment on its claim for

declaratory relief (the "motion"). AB opposed the motion.

On December 2, 2005, the bankruptcy court held a hearing on the motion. The bankruptcy court denied CGO's motion, making its findings of fact and conclusions of law orally on the record. On January 6, 2006, the bankruptcy court entered its order denying the motion.

CGO timely filed its notice of appeal. We granted leave to appeal the bankruptcy court's interlocutory order.

II. Jurisdiction

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2). We have jurisdiction under 28 U.S.C. § 158(c).

III. Issues[4]

(1) Whether the bankruptcy court erred in denying CGO partial summary judgment by finding that the terms of the confirmed plan and the confirmation order prohibited CGO from proceeding to recover the uncapped portion of its lease termination damages claim from AB and the plan proceeds, despite AB's not receiving a discharge.

(2) Whether the bankruptcy court erred in denying CGO partial summary judgment by finding that § 502(b)(6) limited the damages recoverable from the plan proceeds held in trust by AB.

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[4] CGO presented sixteen issues in its brief. We have condensed our discussion around three main issues.

(3) Whether the bankruptcy court erred in denying CGO a writ of attachment against the plan proceeds held in trust by AB.

IV. Standards of Review

We review summary judgment orders de novo. Tobin v. San Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). Viewing the evidence in the light most favorable to the non-moving party, we must determine "whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law." Id.

The preclusive effect of a prior judgment constitutes "a mixed question of law and fact in which the legal questions predominate." Kelley v. South Bay Bank (In re Kelley), 199 B.R. 698, 701 (9th Cir. BAP 1996). Thus, we review the application of claim preclusion de novo. Id.

A chapter 11 plan contains elements of both a judgment and a contract. Dolven v. Bartleson (In re Bartleson), 253 B.R. 75, 78 (9th Cir. BAP 2000). Generally, a chapter 11 plan should be interpreted as a contract. Id. at 78-79. We review questions of contract enforcement and interpretation de novo, unless the parties introduce extrinsic evidence on issues such as intent. Id. at 79; M&I Thunderbird Bank v. Birmingham (In re Consol. Water Util.), 217 B.R. 588, 590 (9th Cir. BAP 1998). In such an event, we review the relevant factual findings for clear error. Captain Blythers, Inc. v. Thompson (In re Captain Blythers, Inc.), 311 B.R. 530, 534 (9th Cir. BAP 2004).

V. Discussion

A. Claim Preclusive Effects of Confirmed Plans

CGO contends that it can recover the uncapped portion of its lease termination damages claim against AB and the plan proceeds because AB will not receive a discharge under the terms of the confirmed plan and operative Code provisions. CGO further asserts that the confirmed plan itself clearly provides that CGO may recover the uncapped portion of its lease termination damages. Thus, CGO contends, it may recover on the uncapped portion of its lease termination damages claim before the allowed interest holders receive a distribution.

CGO misinterprets both the confirmed plan and the relevant Code provisions. In CGO's view, simply because AB did not receive a discharge, the provisions of the confirmed plan have no binding effect on CGO once allowed claims have been paid in full, leaving it free to proceed to collect its uncapped lease termination damages claim against AB and the plan proceeds it holds in trust. Such an interpretation undermines chapter 11 plan confirmation and distorts the effect of a lack of discharge in a chapter 11 liquidating plan.

The terms of a confirmed plan bind all parties, such as the debtor and any creditor or equity security holder, whether or not such party has accepted the plan. 11 U.S.C. § 1141(a). Once the court confirms the plan, "all questions that could have been raised pertaining to the plan are entitled to res judicata [i.e., claim preclusive] effect." Trulis v. Barton, 107 F.3d 685, 691

(9th Cir. 1995).

Claim preclusion bars a party from asserting a claim if "a court of competent jurisdiction has rendered a final judgment on the merits of the claim in a previous action involving the same parties and claims." Id. Claim preclusion applies where: (1) the parties are identical or in privity; (2) a court of competent jurisdiction rendered the judgment in the prior action; (3) there was a final judgment on the merits; and (4) both suits involve the same claim or cause of action. Rein v. Providian Fin. Corp., 270 F.3d 895, 899 (9th Cir. 2001); Stratosphere Litig. LLC v. Grand Casinos, Inc., 298 F.3d 1137, 1142-43 (9th Cir. 2002).

Within the context of chapter 11 plan confirmation, if a party does not appeal the confirmation order, the confirmation order constitutes a final judgment. Trulis, 107 F.3d at 691; Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 972 (9th Cir. 2005); Heritage Hotel Ltd. P'ship I v. Valley Bank (In re Heritage Hotel P'ship I), 160 B.R. 374, 377 (9th Cir. BAP 1993), aff'd without opinion, 59 F.3d 175 (9th Cir. 1995). If a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, it cannot later challenge the provisions of the confirmed plan, even if such provisions arguably are inconsistent with the Code. Beck, 421 F.3d at 972 (quoting Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165, 1172 (9th Cir. 2004)).

As AMB neither objected to the treatment of its claim under the plan nor appealed the confirmation order, the terms of the

plan, as confirmed, became final and bound all parties, including CGO, AMB's successor in interest. Although CGO was not a party in interest at the time the plan was confirmed, as a party in privity through its acquisition of AMB's claim, it is bound by the terms of the confirmed plan in the same way AMB was bound. Hasso v. Mozsgai (In re La Sierra Fin. Servs.), 290 B.R. 718, 729 (9th Cir. BAP 2002)(stating that "a party in privity is bound the same way the [predecessor] is bound"); United States v. Schimmels (In re Schimmels), 127 F.3d 875, 881 (9th Cir. 1997)(defining privity as a party "'so identified in interest with a party to former litigation that [it] represents precisely the same right in respect to the subject matter involved'")(quoting Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977)).

Here, the plan explicitly and unequivocally sets forth the provisions for the liquidation and distribution of AB's assets. It defines the claims and interests deemed allowed and thus eligible to receive distributions under the plan. It explicitly sets forth the order of distribution to such allowed claims and allowed interests and the mechanism for distribution: AB holds the plan proceeds in trust for distribution to claimants holding allowed claims and interests. After payment of allowed administrative claims, secured claims, priority tax and employee claims, unsecured claims, and plan expenses, the allowed interest holders are to receive a distribution, pro rata, out of the remaining plan proceeds.

The plan further provides that, upon the effective date, all of AB's debts would be deemed fixed and adjusted pursuant to the plan. It states that AB would have no further liability on account of any claims or interests, except as set forth in the plan. These terms of the confirmed plan stand and bind CGO. CGO cannot now circumvent the binding effects of the plan by collateral attack in an adversary proceeding.

CGO argues that it has the right to payment on the uncapped portion of its lease termination damages claim before AB makes a distribution to allowed interest holders because the plan earmarks the plan proceeds for distribution to "all" creditors and interest holders. As the bankruptcy court noted, CGO's argument is nothing more than a collateral attack on the confirmed plan. The plan clearly provides that distributions will be made to holders of allowed claims and interests and sets forth the method of distribution and the distribution schedule for the plan proceeds accordingly. CGO cannot demand payment on its claim contrary to the provisions of the confirmed plan.

CGO attempts to circumvent the binding provisions of the plan by arguing that because AB will not receive a discharge, the plan does not bind CGO. The fact that AB will not receive a discharge does not annul any of the plan provisions. CGO misconstrues the unavailability of a discharge within a chapter 11 liquidating plan context. As the bankruptcy court pointed out, CGO attempts to blur the distinction between the unavailability of a discharge under § 1141(d)(3), the meaning of

denial or revocation of a discharge under § 727, and the meaning of a nondischargeable debt or claim under § 523.

Generally, upon confirmation of a plan, a debtor receives a discharge of debts that arose prior to confirmation and of certain other debts, such as claims arising from the rejection of an executory contract or unexpired lease. 11 U.S.C. § 1141(d)(1)(A). A discharge typically relieves the debtor of personal liability on debts. 11 U.S.C. § 524(a); Johnson v. Home State Bank, 501 U.S. 78, 85 n.5 (1991)(stating that a bankruptcy discharge "extinguishes 'the personal liability of the debtor with respect to any debt'"). Exceptions to the discharge exist. An individual debtor does not receive a discharge from a debt deemed nondischargeable under § 523. The court may also deny or revoke the discharge of an individual debtor pursuant to § 727.

A corporate debtor does not receive a discharge upon confirmation of a chapter 11 liquidating plan at all, except as specifically provided for in the confirmed plan. 11 U.S.C. § 727(a)(1); 11 U.S.C. § 1141(d)(3). Accordingly, it remains liable for debts not provided for in the confirmed plan. See Star Phoenix Mining Co. v. West One Bank, 147 F.3d 1145, 1147 n.2 (9th Cir. 1998)(stating that, in a liquidating chapter 11 plan, the confirmation of the plan does not discharge the corporate debtor's debts, but liquidates them).

The distinction between the availability of a discharge to an individual debtor and the unavailability of a discharge to a liquidating corporate debtor is rooted in different public policy

concerns with respect to these two types of debtors. The purpose behind denying a discharge to a liquidating corporate debtor is to prevent trafficking in corporate shells. Borsdorf v. Fairchild Aircraft Corp. (In re Fairchild Aircraft Corp.), 128 B.R. 976, 982 (Bankr. W.D. Tex. 1991)(stating that "by freighting the [corporate] shell with all the claims, so that any claims or portions of claims not paid by the liquidation will attach to the shell . . . [the corporate shell becomes] much less attractive for use in starting up another enterprise.").

CGO asserts that because AB will not receive a discharge, its claim is nondischargeable. The fact that AB will not receive a discharge pursuant to §§ 727(a)(1) and 1141(d)(3) does not transmute the debt allegedly owed to CGO into a nondischargeable debt within the meaning of § 523. Nor does the fact that AB will not receive a discharge signify that its discharge has been revoked or denied within the meaning of § 727, allowing CGO to proceed to recover on its claim from the plan proceeds. These meanings are not interchangeable, as CGO seems to suggest. Though CGO cites to a number of cases in support of its argument, see Miller v. United States, 363 F.3d 999 (9th Cir. 2004); Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177 (9th Cir. BAP 2003); Dolven v. Bartleson (In re Bartleson), 253 B.R. 75 (9th Cir. BAP 2000); DePaolo v. United States (In re DePaolo), 45 F.3d 373 (10th Cir. 1995); In re Howell, 84 B.R. 834 (Bankr. M.D. Fla. 1988); and Goodnow v. Adelman (In re Adelman), 90 B.R. 1012 (Bankr. D.S.D. 1988), none of the authorities cited

stands for the proposition CGO asserts. All of the cases cited by CGO involve debts excepted from discharge pursuant to § 523. CGO does not assert a claim for taxes or alimony or any other of the nondischargeable debts listed in § 523. The cases cited by CGO and their holdings are inapplicable here.

CGO also relies on the fact that the confirmed plan itself states that nothing in the plan or confirmation order may constitute, effect or result in a discharge of AB. As the bankruptcy court noted, such a provision is fairly standard in a liquidating plan. The provision is in keeping with §§ 727(a)(1) and 1141(d)(3), both of which dictate that a corporate debtor in a liquidating plan cannot receive a discharge. See Fairchild, 128 B.R. at 982. The provision does not, however, allow CGO to pursue its claim against the plan proceeds; it only allows CGO to pursue its claim against AB once AB has completed the plan. AB even concedes that it remains liable on the uncapped portion of the lease termination damages claim. Appellant's Opening Brief, 21-22. Nevertheless, CGO cannot "cut in line" before the allowed interest holders and demand payment on its claim from the plan proceeds; the confirmed plan specifically provides otherwise. AB holds the plan proceeds in trust and can only make distributions pursuant to the distribution schedule, as set forth in the confirmed plan.

CGO argues that any right to pursue AB once the plan proceeds are fully distributed is empty, as all assets available to pay its claim would then be gone. Indeed, the plan calls for

the dissolution of AB once the plan proceeds have been distributed. Amended Plan, 17:5.5; Confirmation Order, 19:S. However, if CGO or its predecessor in interest, AMB, were concerned with the loss of the right to pursue claims against AB under provisions of the plan, it needed to object to confirmation and/or appeal the confirmation order. Neither course was followed.

CGO asserts that the injunction contained in the confirmed plan constitutes a de facto discharge in violation of the plan and the Code. The language of the plan could be read to support this assertion. Nonetheless, CGO is precluded from contesting the terms of the plan, as AMB, its predecessor in interest, neither raised the de facto discharge argument in an objection to confirmation nor in an appeal of the confirmation order.

B. Limitation on Liability Under § 502(b)(6)

CGO acknowledges that § 502(b)(6) sets a limit on the amount a landlord may claim for damages resulting from the termination of a lease. CGO asserts, however, that, in cases where the debtor does not receive a discharge, § 502(b)(6) merely limits what the landlord can collect from the bankruptcy estate, not from the debtor personally. Thus, as AB will not receive a discharge and will remain liable on any unpaid debts, CGO may proceed to recover the uncapped portion of its lease termination damages against AB and the plan proceeds once allowed claims have been paid in full.

We recognize that a lessor has the right to assert a claim for damages resulting from the termination of a lease by a debtor. Kuske v. McSheridan (In re McSheridan), 184 B.R. 91, 96 (9th Cir. BAP 1995)("It is well-settled that a lessor is entitled to assert a general unsecured claim for damages resulting from a debtor's rejection of a lease."). Lease termination damages encompass those damages resulting from the debtor's breach of each and every lease provision, including covenants, upon termination of the lease. Id. at 102. Under §§ 502(a) and (b), should a party in interest object to a claim for lease termination damages, such a claim is allowed only to the extent that such claim does not exceed the statutory cap. Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 101 (9th Cir. BAP 2006). We also understand that § 502(b)(6) only limits the amount of damages recoverable from the estate due to termination of the lease. Id.

It is true that CGO may be able to proceed to recover its claim against AB and any assets it has once the plan proceeds have been distributed. But CGO seeks to recover on the uncapped portion of its lease termination damages claim from the plan proceeds that AB is holding in trust under the plan. As discussed above, the binding terms of the confirmed plan clearly lay out the mechanism for and the parties entitled to distributions from the plan proceeds. CGO cannot claim a share in the plan proceeds before the allowed interest holders receive their distribution.

Furthermore, in AMB Property L.P. v. Official Creditors (In re AB Liquidating Corp.), 416 F.3d 961 (9th Cir. 2005), the Ninth Circuit affirmed the bankruptcy court's ruling that fixed AMB's allowed claim. CGO cannot now relitigate the amount of its claim against AB.

C. Terms of Confirmed Plan Preclude A Writ of Attachment

CGO sought a writ of attachment, seeking to attach the plan proceeds to secure recovery of its claim. As discussed above, the binding provisions in the confirmed plan prohibit CGO from doing so. AB is holding the plan proceeds in trust, to be distributed according to the schedule set forth in the plan. The confirmed plan is claim preclusive as to the method of distribution of plan proceeds.

VI. Conclusion

CGO advances numerous arguments in an attempt to convince us that the confirmed plan neither binds it to the treatment specified in the plan nor prohibits it from proceeding to recover the uncapped portion of its lease termination damages claim against the plan proceeds held by AB. A single theory forms the foundation for all of CGO's arguments: that AB will not receive a discharge. Regardless of whether or not AB receives a discharge, however, both the provisions of the confirmed plan and the confirmation order are claim preclusive and bar CGO from proceeding to collect on the uncapped portion of its lease

termination damages claim against the plan proceeds AB holds in trust. The bankruptcy court did not err in denying summary judgment with respect to CGO's request for declaratory relief. Nor did the bankruptcy court err in denying CGO's application for a writ of attachment against AB.

We AFFIRM.