

OCT 05 2009

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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|------------------------------------|---|---|
| In re: |) | BAP No. CC-08-1066 PaMkH |
| |) | |
| INTERNATIONAL BUSINESS PROPERTIES, |) | Bk. No. LA 05-50056 - AA |
| |) | |
| Debtor. |) | Adv. Proc. LA-05-02418 - AA |
| |) | |
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| COUNTY OF RIVERSIDE, CALIFORNIA |) | |
| and TOM MULLEN, |) | |
| |) | |
| Appellants, |) | |
| |) | M E M O R A N D U M ¹ |
| v. |) | |
| |) | |
| INTERNATIONAL BUSINESS PROPERTIES |) | |
| and ARTHUR G. LAWRENCE, |) | |
| |) | |
| Appellees. |) | |
| |) | |
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Argued and Submitted on September 25, 2009
at Pasadena, California

Filed - October 5, 2009

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

Hon. Alan M. Ahart, United States Bankruptcy Judge, Presiding.

Before: PAPPAS, MARKELL and HOLLOWELL, Bankruptcy Judges.

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 County of Riverside, California ("Riverside") and Tom Mullen²
2 appeal the decision of the bankruptcy court denying their request
3 for an award of attorney's fees pursuant to Cal. Rev. & Tax Code
4 § 4807. We AFFIRM.

5
6 **FACTS**

7 Chapter 11³ debtor International Business Properties ("IBP")
8 owned six parcels of land (the "Parcels") in Cathedral City,
9 California ("City"), an incorporated city within Riverside. IBP
10 and its general partner, Arthur G. Lawrence,⁴ have been involved
11 in disputes with Riverside and City since 1991 concerning the
12 amount of property taxes owed to Riverside and assessments owed to
13 City for the Parcels.

14 IBP filed its eighth chapter 11 bankruptcy petition in nine
15 years on September 29, 2004. Case no. LA-04-30832 (the "2004
16
17

18 ² Mullen is Chief Deputy Treasurer and Tax Collector of
19 Riverside. He was sued in this case in his official capacity and
20 is represented by the same counsel as Riverside. Unless necessary
to identify the individual parties, we refer to appellants
collectively as Riverside.

21 ³ Unless otherwise indicated, all chapter, section and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
23 Certain aspects of this dispute arose in connection with a 2004
bankruptcy case filed prior to the effective date of BAPCPA.
24 However, the adversary proceeding giving rise to this appeal was
commenced and prosecuted in connection with a chapter 11 case
25 filed in November 2005, after BAPCPA's effective date.

26 ⁴ It appears that IBP has acted under the direction of its
27 general partner, Lawrence, and counsel for both IBP and Lawrence
has advised the Panel that their interests in this appeal are
28 identical as to the facts, circumstances and law. Unless
necessary to identify the individual parties, we refer to
appellees collectively as IBP.

1 Case"). IBP acknowledges that it filed the petition to prevent a
2 sale of the Parcels by Riverside for delinquent taxes.

3 On February 11, 2005, IBP and Riverside entered into a
4 stipulation (the "Contract") in the 2004 Case for entry of an
5 order granting Riverside relief from the automatic stay. The
6 parties agreed that IBP would pay the delinquent taxes to
7 Riverside and work out a settlement with City within 45 days. IBP
8 withdrew opposition to stay relief. Assuming amounts remained
9 unpaid, Riverside agreed not to sell the Parcels at a tax sale
10 until after expiration of the 45-day period. The bankruptcy court
11 approved the Contract in an order, also entered on February 11,
12 2005.

13 On February 15, 2005, the bankruptcy court, without
14 opposition by IBP, dismissed the 2004 Case in an order containing
15 a 365-day bar prohibiting IBP from filing another bankruptcy
16 petition without permission of the bankruptcy court.

17 Before the 45-day deadline expired, IBP attempted to make a
18 payment of \$6,665.08 on the delinquent Riverside taxes, but
19 Riverside would not credit the payment until all payments had been
20 made, including the City assessments. IBP did not negotiate a
21 settlement of the City assessments before the 45-day deadline in
22 the Contract, or at any time thereafter.

23 On November 4, 2005, IBP filed its ninth chapter 11 petition
24 after receiving a notice that Riverside intended to conduct a tax
25 sale regarding the Parcels. Case no. LA-05-50056 (the "2005
26 Case"). Despite this filing and Lawrence's public announcement at
27 the tax sale that a bankruptcy case had been filed, on November 7,
28 2005, Riverside proceeded with the tax sale of the Parcels. As of

1 the date of the sale, Riverside claimed that there was an unpaid
2 balance of \$73,308.92 for City assessments, and outstanding
3 interest charges on the Riverside taxes. IBP did not have
4 sufficient funds to pay the City assessments prior to the tax
5 sale.

6 On November 14, 2005, IBP and Lawrence filed a complaint
7 against Riverside and Mullen initiating the adversary proceeding
8 giving rise to this appeal. IBP alleged claims for violation of
9 the automatic stay, breach of the Contract, fraud, and for
10 rescission of the Contract. Riverside filed an answer on
11 February 2, 2006, generally denying the allegations and asserting
12 that no automatic stay was in effect at the time of the tax sale.
13 On April 14, 2006, IBP amended its complaint to add claims for
14 conspiracy, rescission, quiet title, declaratory relief,
15 infliction of emotional distress and conversion (the "Additional
16 Claims"). Also, for the first time, IBP named City as a
17 defendant.⁵

18 The relief sought in IBP's amended complaint was an award of
19 general damages from Riverside and City of \$4.5 million. This
20 damage request was later changed to \$1.5 million. Significantly,
21 at no point during the adversary proceeding did IBP seek to enjoin
22 or challenge the validity of Riverside's collection of the
23 property taxes or assessments.

24 On July 7, 2006, the bankruptcy court granted Riverside's
25 motion to dismiss the 2005 Case because it had been filed in

26 ⁵ City never appeared independently of Riverside; both were
27 represented by the same attorney in the bankruptcy court and this
28 appeal. Unless necessary to distinguish the parties, references
to Riverside also include City.

1 violation of the 365-day bar of such filings in the order
2 dismissing the 2004 Case. The bankruptcy court retained
3 jurisdiction over the adversary proceeding.

4 On August 23, 2007, the parties submitted, and the bankruptcy
5 court approved, a joint pretrial order. Again, the agreed
6 pretrial order did not indicate that IBP was attempting to enjoin
7 or otherwise prevent or invalidate the collection of the property
8 taxes or assessments.

9 A trial in the adversary proceeding was held on November 8,
10 2007. Riverside and IBP were present, and the bankruptcy court
11 considered several declarations offered by the parties and heard
12 the testimony of several witnesses. At the end of the
13 presentation of evidence and arguments, the bankruptcy court
14 announced its decision on the record.

15 The bankruptcy court dismissed IBP's claim for violation of
16 the automatic stay and, since they were not included in the joint
17 pretrial order, in IBP's trial brief, nor mentioned during oral
18 argument, the court dismissed IBP's Additional Claims. The
19 bankruptcy court ruled in Riverside's favor on IBP's remaining two
20 claims for breach of contract and fraud, finding that: there was
21 no breach of the Contract by Riverside; City was not a party to
22 the Contract and therefore was not obligated under the Contract;
23 Riverside performed all of its obligations under the Contract and
24 did not sell the Parcels until after IBP had defaulted on its
25 promises; none of Riverside's representations made to IBP in the
26 Contract or later were false; and, even if IBP could prevail on
27 any of its claims, it failed to prove it was damaged because IBP
28 lacked equity in the Parcels. The bankruptcy court entered a

1 judgment in favor of Riverside and against IBP on May 2, 2008.
2 IBP did not appeal the judgment.

3 On December 6, 2007, Riverside filed a motion seeking an
4 award of attorney's fees from IBP in the amount of \$75,547.85 as
5 the prevailing party in the adversary proceeding. For support,
6 Riverside relied on Cal. Rev. & Tax Code § 4807 ("Tax Code
7 § 4807") which provides, in relevant part, that "[i]n the case of
8 a collection of taxes pursuant to a bankruptcy proceeding, the
9 county may request a reasonable amount of attorney's fees." In
10 its opposition to the motion filed on December 26, 2007, IBP
11 argued that because Tax Code § 4807 was designed to prevent a
12 party from seeking to enjoin a taxing authority from proceeding
13 with the collection of taxes, the statute did not apply to the
14 adversary proceeding where IBP never sought a prepayment
15 adjudication nor to delay the collection of the taxes.⁶

16 The bankruptcy court conducted a hearing on Riverside's
17 motion for attorney's fees on January 9, 2008. On February 2,
18 2008, the court entered an order denying the motion for attorney's
19 fees without explanation.⁷

20 On February 20, 2008, Riverside filed a timely appeal of the
21 bankruptcy court's order denying attorney's fees.

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25 ⁶ City also requested attorney's fees as a third party
26 beneficiary of a contract that allowed attorney's fees. City's
request was denied and this ruling was not appealed.

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27 ⁷ Because the parties did not include a transcript of the
28 hearing on the attorney fee motion, we are unaware if the
bankruptcy court explained the basis for its decision to deny the
motion at that hearing.

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JURISDICTION

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

ISSUE

Whether the bankruptcy court erred in denying an award of attorney's fees to Riverside.

STANDARD OF REVIEW

We review a bankruptcy court's construction of state law de novo. Feldman v. Allstate Ins. Co., 322 F.3d 660, 663 (9th Cir. 2003); Sticka v. Casserino (In re Casserino), 290 B.R. 735, 737 (9th Cir. BAP 2003), aff'd 379 F.3d 1069 (9th Cir. 2004).

DISCUSSION⁸

A "prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." Ford v. Baroff (In re Baroff), 105 F.3d 439, 441 (9th Cir. 1997). The principal issues raised and decided in the adversary proceeding related to the Contract, and "state law necessarily controls an action on a contract." Id. at

⁸ The single issue presented in this appeal is a purely legal one concerning application of the statute. The standard of review is de novo such that the Panel does not give deference to the bankruptcy court's interpretation of that statute. We have access to the same facts as did the bankruptcy court. Thus, we can effectively review its order despite the missing hearing transcript and the lack of an explanation of the court's reasons for its decision. Ehrenberg v. Cal State Univ., Fullerton Found. (In re Beachport Entm't), 396 F.3d 1083, 1087 (9th Cir. 2004).

1 441. A prevailing party may recover attorney's fees and costs
2 incurred in prosecuting a claim arising under state law in a
3 bankruptcy court adversary proceeding, "if that party would have
4 been entitled to such a recovery under applicable state law."
5 Wiggins v. Peachtree Settlement Funding (In re Wiggins),
6 273 B.R. 839, 886 (Bankr. D. Idaho 2001).

7 Riverside argues that it prevailed in the litigation with
8 Debtor, and is entitled to attorney's fees under Tax Code § 4807.
9 This provision states:

10 No injunction or writ of mandate or other legal or
11 equitable process shall issue in any suit, action, or
12 proceeding in any court against any county,
13 municipality, or district, or any officer thereof, to
14 prevent or enjoin the collection of property taxes
sought to be collected. In the case of a collection of
taxes pursuant to a bankruptcy proceeding, the county
may request a reasonable amount of attorney's fees.

15 In opposition to Riverside's position, IBP contends that this
16 statute was not intended by the legislature to apply in the
17 context of its litigation with Riverside. The ultimate task for
18 the Panel in interpreting a California statute is "to ascertain
19 the legislature's intent." Neilson v. Chang (In re First T.D. &
20 Inv., Inc.), 253 F.3d 520, 527 (9th Cir. 2001). Or as the
21 California Supreme Court explained, "In constructing a statute, we
22 begin with the fundamental rule that a court should ascertain the
23 intent of the legislature so as to effectuate the purpose of the
24 law." Cal. Teachers Ass'n v. San Diego Cmty. College Dist.,
25 28 Cal.3d 692, 697, 621 P.2d 856, 861 (1981). Generally, "the
26 words of the statute provide the most reliable indication of
27 legislative intent." Pac. Gas & Elec. Co. v. County of
28 Stanislaus, 16 Cal.4th 1143, 1152, 947 P.2d 291, 299 (1997). In

1 interpreting the words, we are to give them their "usual, ordinary
2 import." Dyna-Med, Inc. v. Fair Employment & Housing Comm'n,
3 43 Cal.3d 1379, 1386-87 (Cal. 1987). Above all else, where the
4 meaning of a statute is clear and unambiguous, "there is no need
5 for construction and courts should not indulge in it." Delaney v.
6 Super. Ct., 50 Cal.3d 785, 800, 789 P.2d 934 (Cal. 1990).

7 The California legislature enacted Tax Code § 4807 as the
8 statutory implementation of California Constitution, art. XIII,
9 sec. 32, which provides that "[n]o legal or equitable process
10 shall issue in any proceeding in any court against this State or
11 any officer thereof to prevent or enjoin the collection of any
12 tax." The legislative policy promoted by this statute and
13 Constitutional provision is "to allow revenue collection to
14 continue during litigation." Merced County Taxpayers Ass'n v.
15 Cardella, 218 Cal. App.3d 396, 400 (Cal. Ct. App. 1990); accord
16 Pac. Gas & Elec. Co. v. State Bd. Of Equalization, 27 Cal.3d 277,
17 283, 611 P.2d 663, 669 (Cal. 1980) (purpose of provisions is to
18 allow revenue collection during litigation). Over the years, the
19 California courts have expanded the scope of Tax Code § 4807 to
20 also prohibit attempts to prevent future collection of taxes.
21 Under these decisions, any legal action or defense seeking a
22 "prepayment adjudication that would effectively prevent the
23 collection of a tax [is] barred." Riverside County Cmty.
24 Facilities Dist. v. Bainbridge 17, 77 Cal. App. 4th 644, 661
25 (Cal. Ct. App. 1999, recertified for publication 2000) (quoting
26 McKendry v. County of Kern, 180 Cal. App. 3d 1165, 1170 (Cal. Ct.
27 App. 1986)).

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1 The parties have not cited, nor have we found, any case law
2 interpreting or applying Tax Code § 4807 in a bankruptcy
3 proceeding. But our investigation into the legislative intent
4 supporting the adoption of Tax Code § 4807 is aided by the actions
5 of the California legislature.

6 A cursory review of the text of the statute reveals an
7 anomaly: The first sentence of the statute generally bars a court
8 from entering any injunction or taking other action to inhibit the
9 power of any local government unit to collect taxes; there is no
10 direct authorization in the first sentence for an award of
11 attorney's fees. Then, in the second sentence, in those limited
12 circumstances where a county is pursuing collection of taxes in a
13 "bankruptcy proceeding," the statute provides that the county
14 "may" request an award of attorney's fees. While the differences
15 in the phrasing and scope of the two sentences seem striking,
16 viewed in historical context, the legislature's intent becomes
17 apparent.

18 The first sentence was the full text of the original statute
19 enacted in 1977. The second provision was added to the statute
20 via an amendment adopted by the California legislature in 1998.
21 According to the legislative history for this amendment, there was
22 a growing concern in the legislature that parties were resorting
23 to the bankruptcy courts to interrupt or stop collection of taxes.
24 As described in the Senate Committee Report,

25 Existing law prohibits any injunction or other legal
26 proceeding in any court against a city, county or
27 district to prevent or enjoin the collection of property
28 taxes. Sponsors state that despite this prohibition,
various suits and other legal actions are commenced
against tax collectors, particularly with respect to
bankruptcy proceedings. [The proposed modification of

1 Tax Code § 4807] would permit counties to request
2 reasonable attorney's fees in cases of collection of
taxes pursuant to bankruptcy proceedings.

3 Committee Report on Senate Bill 2233, 1997-1998 Session (Cal.
4 1998).

5 The clear intent of the California legislature in enacting
6 Tax Code § 4807 was to keep tax revenue flowing during litigation.
7 In the case of bankruptcy proceedings, the California legislature
8 apparently recognized that it did not have the authority to
9 dictate to the federal bankruptcy court what injunctions or
10 proceedings that court could entertain. But also apparently
11 recognizing that the bankruptcy courts could consider requests for
12 attorney's fees if authorized under state law, the legislature
13 created that authority in the second sentence of Tax Code § 4807,
14 thereby deterring actions to interfere with tax collection through
15 the bankruptcy courts.

16 Contrary to the position of Riverside in this appeal, Tax
17 Code § 4807 is not a general authorization for recovery of
18 attorney's fees by prevailing parties in tax-related litigation.
19 As construed by the California courts, the statute only applies
20 where a party initiates litigation with the purpose of enjoining
21 or in some way preventing the collection of taxes by local
22 government.

23 By its adversary proceeding, IBP never sought to enjoin or
24 interrupt the flow of tax revenues to Riverside or City. As a
25 remedy for Riverside's and City's actions, IBP sought a money
26 damage award. IBP did not propose to interfere with the taxes
27 that Riverside had already collected via the tax sales. Indeed,
28 the tax sales had already occurred and the unpaid taxes and

1 assessments had effectively been satisfied by the time the
2 adversary proceeding was commenced. IBP did not seek a return of
3 those paid taxes and assessments. It also did not seek in its
4 complaint to impose any limits on any future tax liabilities.
5 Since there was no attempt by IBP in this adversary proceeding to
6 enjoin or in any way prevent Riverside from collecting or imposing
7 taxes and assessments, or to place any future limitations on
8 Riverside's authority to collect taxes, Tax Code § 4807 is
9 inapplicable and cannot serve as a basis for an award of
10 attorney's fees to Riverside in this dispute.

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CONCLUSION

13 The bankruptcy court did not err in denying attorney's fees
14 to Riverside under these facts. We AFFIRM the decision of the
15 bankruptcy court.

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