

DEC 02 2016

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-16-1100-DKiF
)	
ADVANCED BIOMEDICAL, INC.,)	Bk. No. 14-15938-MW
)	
Debtor.)	Adv. Proc. No. 14-01275-MW
)	
ADVANCED BIOMEDICAL, INC.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
SPECIALTY LABORATORIES, INC.,)	
)	
Appellee.)	
)	

Argued and Submitted on November 17, 2016
at Pasadena, California

Filed - December 2, 2016

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

Honorable Mark S. Wallace, Bankruptcy Judge, Presiding

Appearances: Dixon Leon Gardner argued for Appellant; Timothy
Carl Aires of Aires Law Firm argued for Appellee.

Before: DUNN,² KIRSCHER, and FARIS, 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 8024-1.

² Hon. Randall L. Dunn, United States Bankruptcy Judge for
the District of Oregon, sitting by designation.

1 Appellant Advanced Biomedical, Inc. ("ABI") appeals from a
2 bankruptcy court judgment determining that, because ABI's
3 accounts receivable ("Receivables") were assigned prepetition to
4 Specialty Laboratories, Inc. ("SLI"), the Receivables were not
5 property of ABI's chapter 11³ bankruptcy estate.

6 We AFFIRM.

7 **I. BACKGROUND**

8 SLI sued ABI in the Superior Court ("Superior Court") of the
9 State of California, County of Orange ("State Court Litigation").
10 The State Court Litigation was resolved on January 10, 2014, by
11 the entry of a stipulated judgment ("State Court Judgment") in
12 favor of SLI and against ABI in the amount of \$227,386.99. On
13 January 15, 2014, SLI filed with the California Secretary of
14 State a Notice of Judgment Lien against ABI.

15 When the State Court Judgment remained unsatisfied, SLI
16 sought and obtained relief in the Superior Court pursuant to Cal.
17 Civ. Proc. Code § 708.510 in the form of an "Assignment Order Re:
18 Rights to Payment of Money Due or to Become Due" ("Assignment
19 Order"). The Assignment Order provides in relevant part:

20 IT IS HEREBY ORDERED that the interest, if any, of
21 . . . [ABI] . . . in its rights to payment of money due
22 or to become due, whether styled accounts receivable,
23 general intangibles, accounts, deposit accounts,
24 royalties, fees, commissions, or otherwise, from its
25 activities as a provider of clinical laboratory
26 services to physicians, clinics, hospitals, and other
27 healthcare providers, whether standing in the name of
28 "Advanced Biomedical Inc." or "Pathology Laboratory
Services," and from or through any business entity or

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

1 person [with] which they are affiliated . . . is
2 assigned to [SLI] . . . to the extent necessary to
3 satisfy the judgment entered in this action in full,
4 which as of September 3, 2014, is \$242,320.07.

5 The Assignment Order was entered in the State Court Litigation on
6 September 25, 2014.

7 On October 1, 2014, ABI filed a voluntary Chapter 11
8 petition. On October 14, 2014, SLI commenced an adversary
9 proceeding by filing a complaint ("Complaint"), amended on
10 January 8, 2015, against ABI. The Complaint sought a
11 determination that the Receivables were not property of ABI's
12 bankruptcy estate.⁴

13 Although the record on appeal does not include a copy of
14 ABI's answer to the Complaint, ABI's amended trial brief filed on
15 November 6, 2015, asserted the following theories in opposition
16 to the Complaint:

17 - SLI has no right to enforce the Assignment Order. Under
18 this theory, ABI (1) disputes that under Cal. Civ. Proc. Code
19 § 708.510 the Assignment Order constitutes an absolute assignment
20 of the Receivables to SLI; (2) asserts that the Assignment Order
21 is not enforceable because (a) the IRS held a first priority lien
22 in the Receivables at the time the Assignment Order was entered
23 and because the IRS never received notice of the proceedings that
24 resulted in the entry of the Assignment Order; (b) SLI never gave
25 notice of it to "anyone who owes money to [ABI]"; (c) SLI never
26 gave a written demand to ABI to turn over the proceeds of the

27 ⁴ As alternative relief, the Complaint sought a
28 determination that SLI was a judgment lien creditor with a
security interest in the Receivables.

1 Receivables; (d) SLI failed to follow proper procedures to
2 enforce the Assignment Order; and (e) SLI's proof of claim filed
3 in the bankruptcy case admits that the Assignment Order is not
4 part of SLI's claim.

5 - SLI failed to include debtor's other secured creditors and
6 obligors in the adversary proceeding with the result that the
7 bankruptcy court cannot decide the priority and extent of SLI's
8 lien.

9 - Assignment orders against debtors-in-possession are
10 disfavored as a matter of Ninth Circuit law.

11 - SLI filed the adversary proceeding in bad faith.

12 ABI's post-trial brief filed on November 25, 2015, restated
13 its arguments that under California law, the Assignment Order is
14 ineffective to transfer title of ABI's Receivables to SLI.

15 The bankruptcy court tried the issues raised in the
16 Complaint on November 20, 2015. Three days after the trial,
17 ABI's counsel contacted a Bankruptcy Specialist at the Internal
18 Revenue Service ("IRS"). Shortly thereafter, the United States
19 of America, on behalf of its agency, the IRS, moved to intervene
20 in the Adversary Proceeding. The bankruptcy court granted the
21 motion and authorized the IRS to file a post-trial brief to
22 address the issue of whether the Assignment Order was effective
23 where recorded IRS tax liens existed at the time the Assignment
24 Order was entered. ABI joined in the IRS's post-trial brief, and
25 incorporated into that joinder a "response," in which ABI for the
26 first time asserted that any levy by SLI against the Receivables
27 under the Assignment Order constituted both a preferential
28 transfer and a violation of the absolute priority rule.

1 The bankruptcy court entered its Memorandum Decision and
2 Order ("Decision") on March 22, 2016, in which it determined that
3 the Assignment Order effected an absolute transfer of ABI's
4 interest in the Receivables to SLI, such that SLI became the
5 owner of the Receivables not later than September 25, 2014. The
6 Decision was followed by entry of judgment in favor of SLI on
7 March 31, 2016. ABI filed a timely Notice of Appeal on April 13,
8 2016.

9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b) (2) (A) and (O). We have jurisdiction under
12 28 U.S.C. § 158.

13 **III. ISSUES**

14 Whether the bankruptcy court erred when it determined that
15 the Assignment Order, entered pursuant to Cal. Code of Civ. Proc.
16 § 708.510, was an absolute assignment.

17 Whether the bankruptcy court erred when it determined that
18 the Assignment Order was effective to transfer to SLI,
19 prepetition, ABI's interest in the Receivables, such that the
20 Receivables were not property of ABI's bankruptcy estate.

21 **IV. STANDARDS OF REVIEW**

22 We review a bankruptcy court's legal conclusions and
23 application of state law de novo. Circle K Corp. v. Collins
24 (In re Circle K Corp.), 98 F.3d 484, 486 (9th Cir. 1996); Hopkins
25 v. Cerchione (In re Cerchione), 414 B.R. 540, 545 (9th Cir. BAP
26 2009).

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V. DISCUSSION

A. The Scope of This Appeal is Limited to Matters Considered by the Bankruptcy Court.

This panel generally will not consider a claim or issue that was not properly raised in the bankruptcy court. Mano-Y & M, Ltd. v. Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998 (9th Cir. 2014); Hasse v. Rainsdon (In re Pringle), 495 B.R. 447, 453 n.2 (9th Cir. BAP 2013).

Citing Jovanich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), ABI includes in its opening brief arguments that it concedes "were not raised in the pleadings, at trial, and the post-trial" proceedings, asserting that our consideration of those arguments is "needed to prevent a miscarriage of justice and to preserve the integrity of the judicial process." ABI's Opening Brief at 11:6-9. However, as stated in Jovanich, the Ninth Circuit has permitted "only narrow and discretionary exceptions to the general rule against considering issues for the first time on appeal." 813 F.2d at 1037. Specifically, new issues are considered "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in law raises a new issue while an appeal is pending, and (3) when the issue is purely one of law." Id. Under more recent case law, the Ninth Circuit recognizes four exceptions which authorize an appellate court to exercise its discretion to reach issues otherwise waived in the trial court:

- Exceptional circumstances explain why the issue was not raised in the trial court;

1 - New issues have become relevant while the appeal was
2 pending because of a change in the law;

3 - The issue presented was purely legal and the opposing
4 party will not be prejudiced by the failure to raise
5 the issue in the district court; or

6 - Plain error has occurred and the issue must be
7 addressed to avoid an injustice.

8 See Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1293 (9th
9 Cir. 2015).

10 ABI's Opening Brief is replete with arguments not presented
11 to the bankruptcy court, including that (1) the Assignment Order
12 violated due process under the 5th and 14th Amendments of the
13 U.S. Constitution, (2) transfer of title to the Receivables to
14 SLI without the IRS's consent and before its priority tax liens
15 were paid in full constitutes a conversion pursuant to Cal. Civ.
16 Proc. Code § 701.040, and (3) the Assignment Order is avoidable
17 as a preference pursuant to § 547 of the Bankruptcy Code. We
18 decline ABI's invitation to consider new issues in this appeal.

19 "[W]e will not reframe an appeal to review what would be in
20 effect a different case than the one decided by the [trial]
21 court." Baccai v. United States, 632 F.3d 1140, 1149 (9th Cir.
22 2011). Further, an issue merely alluded to or raised in passing
23 at the trial court level, such as the preference issue raised in
24 ABI's joinder to the IRS's post-trial brief, is not necessarily
25 preserved for appeal. See Conservation NW v. Sherman, 715 F.3d
26 1181, 1188 (9th Cir. 2013). Here, the preference issue was
27 buried in a brief authorized by the bankruptcy court solely on
28 the issue of whether the existence of IRS tax liens precluded the

1 Assignment Order from becoming effective as a matter of law.⁵

2 **B. The Receivables Are Not Property of ABI's Bankruptcy Estate.**

3 When ABI filed its bankruptcy petition, all of its legal or
4 equitable interests in property held on that date became property
5 of its bankruptcy estate. See § 541. In this appeal, the
6 ultimate issue is whether the Assignment Order served to divest
7 ABI of title to the Receivables before the bankruptcy case was
8 commenced. The existence and scope of ABI's interest in the
9 Receivables is determined under California state law. See Butner
10 v. United States, 440 U.S. 48, 54 (1979).

11 **1. The Assignment Order Effectively Transferred Title to**
12 **the Receivables to SLI.**

13 Cal. Civ. Proc. Code § 708.510 provides the relevant
14 statutory authority for disposition of this appeal:

15 **Assignment of right to payments; service of notice;**
16 **factors considered in ordering assignment; amount**
17 **assigned**

18 (a) Except as otherwise provided by law, upon
19 application of the judgment creditor on noticed motion,
20 **the court may order the judgment debtor to assign to**
21 **the judgment creditor . . .** all or part of a right to
22 payment due or to become due, whether or not the right
23 is conditioned on future developments . . .

24 . . .

25 (d) A right to payment may be assigned pursuant to this
26 article only to the extent necessary to satisfy the

27 ⁵ Further, subsequent to filing the instant appeal, ABI
28 commenced an adversary proceeding in the bankruptcy court seeking
to avoid the Assignment Order as a preferential transfer. SLI
filed a motion to dismiss the complaint, inter alia, because it
argues that the preference claim was a compulsory counterclaim in
the litigation which resulted in the judgment upon which this
appeal is based. The proceedings on these issues are ongoing in
the bankruptcy court.

1 money judgment.

2 . . .

3 (Emphasis added.)

4 The bankruptcy court determined that, on its face, the
5 Assignment Order satisfied all of the requirements and
6 prerequisites of Cal. Civ. Proc. Code § 708.501(a) and (d):

7 The Assignment Order recites that it was issued in
8 response to a noticed motion ("with proof of service
9 having been made") brought by [SLI]. The [State Court]
10 assigned to [SLI] all rights to payment due or to
11 become due, but only to the extent necessary to satisfy
12 the [State Court Judgment] of \$242,320.07. No doubt
13 exists that [SLI] is a "judgment creditor" within the
14 meaning of section 708.510(a).

15 Decision at 6:3-7.

16 Further, the bankruptcy court determined that a direct
17 assignment of the Receivables by the Superior Court to SLI did
18 not impact the validity of the assignment, despite the language
19 of Cal. Civ. Proc. Code § 708.501(a), which appears to authorize
20 the Superior Court only to "order the judgment debtor to assign
21 to the judgment creditor." In reaching this conclusion, the
22 bankruptcy court relied on Weingarten Realty Investors v. Chiang,
23 212 Cal. App. 4th 163 (4th Dist. 2012). As noted by the
24 bankruptcy court, in Weingarten, the California Court of Appeal
25 found no defect in the assignment order before it which directly
26 transferred property to a judgment creditor rather than merely
27 ordering the judgment debtor to transfer the property.

28 We agree that, by its terms, the Assignment Order
transferred title to the Receivables to SLI as authorized by Cal.
Civ. Proc. Code § 708.510, and that the direct assignment is
valid under California law.

1 However, ABI asserts the Assignment Order was not effective
2 to transfer title based on the language of Cal. Civ. Proc. Code
3 § 708.530, which provides:

4 (a) Except as provided in subdivision (b), the effect
5 and priority of an assignment ordered pursuant to this
6 article is governed by Section 955.1 of the Civil Code.
7 For the purpose of priority, an assignee of a right to
8 payment pursuant to this article shall be deemed to be
9 a bona fide assignee for value under the terms of
10 Section 955.1 of the Civil Code.

11 Cal. Civil Code § 955.1 provides:

12 (a) Except as provided in Sections 954.5 and 955
13 and subject to subdivisions (b) and (c), a transfer
14 other than one intended to create a security interest
15 pursuant to paragraph (1) or (3) of subdivision (a) of
16 Section 9109 of the Commercial Code, of any payment
17 intangible, as defined in Section 9102 of the
18 Commercial Code, and any transfer of accounts, chattel
19 paper, payment intangibles, or promissory notes
20 excluded from the coverage of Division 9 of the
21 Commercial Code by paragraph (4) of subdivision (d) of
22 Section 9109 of the Commercial Code shall be deemed
23 perfected as against third persons upon there being
24 executed and delivered to the transferee an assignment
25 thereof in writing.

26 (b) As between bona fide assignees of the same right
27 for value without notice, the assignee first giving
28 notice of the right to the obligor in writing has
priority.

 (c) The assignment is not, of itself, notice to the
obligor so as to invalidate any payments made by the
obligor to the transferor.

. . .

ABI contends that taken together these two statutes
establish that the transfer under the Assignment Order is only
"perfected" in the assignee as a creditor, not as an owner. We
disagree. An assignee is not a creditor for purposes of these
statutes. By its terms, Cal. Civ. Proc. Code § 708.530 provides
that SLI is "deemed an assignee for value." Cal. Civil Code
§ 955.1 merely establishes SLI's rights with respect to third

1 parties. Specifically, by giving notice to an obligor, SLI could
2 obtain priority over subsequent assignees.

3 As further support for its contention that there was no
4 absolute assignment of the Receivables, ABI points out that there
5 was no mechanism in the Assignment Order to assign back to ABI
6 rights to collect the Receivables once the underlying judgment
7 debt had been satisfied. ABI argues that the absence of a
8 reassignment mechanism establishes there was no absolute transfer
9 in the first instance. However, there was no need for the
10 Assignment Order to establish a reassignment mechanism. The
11 existence of Cal. Civ. Proc. Code § 708.560, which provides a
12 statutory mechanism for reassignment, defeats this argument.
13 Cal. Civ. Proc. Code § 708.560 provides:

14 (a) Either the judgment creditor or the judgment debtor
15 may apply to the court on noticed motion for an order
16 to modify or set aside the assignment order. The
notice of motion shall be served on the other party.
Service shall be made personally or by mail.

17 (b) The court shall make an order modifying or setting
18 aside the assignment order upon a showing that there
19 has been a material change in circumstances since the
20 time of the previous hearing on the assignment order.
The court may order a reassignment of the right to
payments as necessary. The order shall state whether
and to what extent it applies to payments already made.

21 The bankruptcy court did not err when it determined that
22 title to the Receivables was transferred to SLI prepetition. As
23 such, the Receivables did not become property of ABI's bankruptcy
24 estate.

25 **2. The Assignment Order is Not Void.**

26 Notwithstanding that the Assignment Order was entered as
27 authorized pursuant to Cal. Civ. Proc. Code § 708.510 and
28 expressly transfers the Receivables to SLI, ABI contends that a

1 number of "infirmities" nevertheless render the Assignment Order
2 void. In addressing these varied arguments, we begin with the
3 premise that

4 The preclusive effect of a state court judgment in a
5 subsequent federal lawsuit generally is determined by
6 the full faith and credit statute, which provides that
7 state judicial proceedings "shall have the same full
8 faith and credit in every court within the United
9 States . . . as they have by law or usage in the courts
10 of such State . . . from which they are taken."
11 28 U.S.C. § 1738.

12 Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th
13 Cir. 1995) (internal citations omitted). ABI did not appeal the
14 Assignment Order, so for purposes of the current dispute, it is
15 final.

16 First, ABI asserts that the Assignment Order violates
17 bankruptcy policies and purposes. Specifically, ABI contends
18 that the purpose of bankruptcy is to rehabilitate debtors
19 successfully and to maximize the value of the bankruptcy estate,
20 and that bankruptcy courts are required to preserve a level
21 playing field for all parties. ABI's argument in this regard
22 suggests that, in determining that the Assignment Order
23 effectively transferred ABI's interest in the Receivables, the
24 bankruptcy court violated this purpose and has increased rather
25 than minimized litigation in the bankruptcy case because the
26 bankruptcy court's Decision "forces [ABI] to file an adversary
27 proceeding to recover the Receivables under [§ 547] as a
28 preferential transfer." Opening Brief at 20:17-18. Nothing in
the Bankruptcy Code or case law supports ABI's contention that,
as a matter of policy, a bankruptcy court must determine an order
void so that a party does not need to litigate whether that order

1 is avoidable as a preferential transfer.

2 Second, ABI asserts that the Assignment Order is void
3 because it violates California law. Citing Global Money Mgmt. v.
4 McDonnold, 2009 WL 3352574 *3 (S.D. Cal. Oct. 15, 2009), ABI
5 contends that the Assignment Order is not enforceable. ABI
6 asserts that the California court could not affect title to
7 property in another state even with personal jurisdiction over
8 the property's owner. ABI asserts that Global Money Mgmt. stands
9 for the proposition that "a California Superior Court has
10 personal jurisdiction over a non-resident defendant who owns
11 property outside of California, because **there is no change of**
12 **title to property under any assignment order issued under [Cal.**
13 **Civ. Proc. Code] § 708.510."** Opening Brief at 23:18-24:10
14 (emphasis added). By this argument ABI appears to contend that
15 to the extent the Receivables were owed by persons or entities
16 outside of California, the California court had no jurisdiction
17 to assign them to SLI. The error in this argument stems from
18 ABI's misapprehension of the nature of the Assignment Order.
19 What was assigned to SLI was ABI's "rights to payment of money
20 due or to become due." Nothing in the Assignment Order purports
21 to impact the rights of any person or entity obligated to pay.
22 See Cal. Civ. Proc. Code § 708.540 ("The rights of an obligor are
23 not affected by an order assigning the right to payment until
24 notice of the order is received by the obligor. For purposes of
25 this section, 'obligor' means the person who is obligated to make
26 payments to the judgment debtor or who may become obligated to
27 make payments to the judgment debtor depending upon future
28 developments."). Further, as stated by the bankruptcy court,

1 The mere fact that [the Assignment Order] may not be
2 effective against a particular obligor (or even all
3 obligors) because of lack of notice to them does not
alter the effectiveness of the [Assignment Order]
against [ABI].

4 Decision at 10:23-26. We observe, as did the bankruptcy court,
5 that Cal. Civ. Proc. Code § 708.510 contains no condition
6 precedent that obligors receive notice prior to the issuance of
7 the Assignment Order.

8 Third, ABI asserts that the Assignment Order is void because
9 the IRS did not receive notice of the proceedings under Cal. Civ.
10 Proc. Code § 708.510. As stated by the bankruptcy court,
11 "[N]othing in the language of the Assignment Order mentions the
12 IRS or in any way affects or purports to affect the IRS's
13 rights." Decision at 9:28-10:1. Nothing in Cal. Civ. Proc. Code
14 § 708.510 requires that lien creditors receive notice prior to
15 the issuance of the Assignment Order. This is not surprising,
16 because an assignee takes property subject to existing liens.
17 Moreover, 26 U.S.C. § 7425 preserves the IRS's liens in the
18 context of the Assignment Order.

19 Notwithstanding our discussion of ABI's contentions that the
20 Assignment Order is void, we restate that the Assignment Order is
21 a final order entered in the State Court Litigation that ABI did
22 not appeal. ABI's challenges to the validity of the Assignment
23 Order therefore constitute nothing more than an impermissible
24 collateral attack on the Assignment Order.

25 **3. The Bankruptcy Court's Judgment is Not Void.**

26 ABI asserts that the bankruptcy court's judgment itself is
27 void, because "bankruptcy law disfavors levies and assignments."
28

1 ABI cites to cases⁶ which hold that a bankruptcy court does not
2 enforce a levy against property of the bankruptcy estate. While
3 true, it is a principle inapplicable in the context of this
4 appeal. There has been no attempt to levy in the bankruptcy
5 court. The Assignment Order was entered before the bankruptcy
6 petition was filed, and the bankruptcy court determined that the
7 Receivables were not property of the bankruptcy estate for the
8 reasons cited above.

9 VI. CONCLUSION

10 The Assignment Order was effective to transfer title to the
11 Receivables to SLI prior to the commencement of the bankruptcy
12 case. Therefore, the Receivables never became property of ABI's
13 bankruptcy estate. We AFFIRM the judgment of the bankruptcy
14 court.

15 We deny ABI's request that in the event we affirm the
16 judgment we require the bankruptcy court to consider issues
17 relating to the value of the Receivables, the impact of the IRS's
18 liens on SLI's rights in the Receivables, and the impact on SLI's
19 rights in the Receivables to the extent obligors are not
20 California residents as not properly within the scope of issues
21 before the Panel to decide in this appeal. Such issues may or
22 may not have to be decided by the bankruptcy court in further
23 proceedings in ABI's bankruptcy case.

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26 ⁶ Priestly v. Hilliard & Tabor (In re Argonaut Shoe Co.),
27 187 F. 784 (9th Cir. 1911); Grant v. Burns (In re Am. Elec. Tel.
28 Co.), 211 F. 88 (7th Cir. 1914); and NVLAND, Inc. v. Vogel
(In re Ocean Downs Racing Ass'n, Inc.), 164 B.R. 249 (Bankr. D.
Md. 1993).