



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 19, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re:

JAIRO ALEJANDRO RODRIGUEZ,
fdba RUTISHAUSER, LLC DBA NLV
PAIN MANAGEMENT & URGENT
CARE, dba CAF MEDICAL, LLC DBA
INJURY & CHRONIC PAIN CENTER,
dba INJURY MEDICAL CONSULTANTS,
LLC

Debtor.

DOUGLAS B. ROSS, M.D., an individual,

Plaintiff,

v.

JAIRO ALEJANDRO RODRIGUEZ, an
individual,

Defendant.

Case No. 18-14694-MKN

Chapter 7

Adv. Proc. No. 18-01123-MKN

Date: February 28, 2019

Time: 1:30 p.m.

**ORDER ON MOTION TO DISMISS; OR ALTERNATIVELY,
MOTION FOR SUMMARY JUDGMENT¹**

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 On February 28, 2019, the court heard the Motion to Dismiss; or Alternatively, Motion
2 for Summary Judgment (“Dismissal Motion”) brought by Jairo Alejandro Rodriguez (“Debtor”).
3 The appearances of counsel were noted on the record. After arguments were presented, the
4 matter was taken under submission.

5 BACKGROUND

6 On August 6, 2018, Debtor filed a voluntary Chapter 7 petition (“Petition”). (ECF No.
7 1). On August 7, 2018, an amended notice of the Chapter 7 filing (“Bankruptcy Notice”) was
8 issued scheduling a meeting of creditors for September 13, 2018, and notifying creditors of the
9 appointment of a Chapter 7 trustee. (ECF Nos. 40 and 44). The Chapter 7 proceeding was
10 assigned for administration to a panel Chapter 7 trustee, Lenard E. Schwartz. Debtor’s
11 schedules of assets and liabilities (“Schedules”) and statement of financial affairs (“SOFA”), and
12 other required information were filed on August 17, 2018. (ECF No. 46).

13 On Debtor’s SOFA, he lists a breach of contract action entitled “Douglas B. Ross, M.D.
14 vs. Jairo Rodriguez, PAC, A-15-728577-B”. Both the Schedules and SOFA are signed by the
15 Debtor under penalty of perjury. According to his Schedule “A/B,” Debtor has an interest in the
16 following entities: CAF Medical, LLC dba Injury & Chronic Pain Center (“CAF Medical”),
17 Rutishauser, LLC dba NLV Pain Management & Urgent Care (“Rutishauser”),² Injury Medical
18 Consultants, and Elite Firearms and Tactical, LLC.³ He attests that the value of his interests in
19 all of the entities is \$0.00. Debtor also lists an interest in unpaid wages of approximately
20 \$550,000 owed to him by Rutishauser.

21 According to his SOFA, Debtor was the subject of two lawsuits pending at the time he
22 filed his Petition: Douglas B. Ross, M.D. v. Jairo Rodriguez, PAC, et al., Case No. A-15-
23 728577-B (“Ross Litigation”), and Michael Ladner v. Jairo Rodriguez, M.D., NLV Pain
24 Management & Urgent Care, Case No. A-18-767642-C. Both lawsuits were filed in the Eighth
25 Judicial District Court, Clark County, Nevada (“State Court”).

26 ² According to the Schedule, Debtor has a 67% ownership interest in Rutishauser.

27 ³ On the same date, Debtor filed an amendment to his Petition that included an attachment
28 specifically identifying CAF Medical and Rutishauser as sole proprietorships and as health care
businesses within the meaning of Section 101(27A). (ECF No. 48).

1 On the same date he filed his Petition, Debtor also filed a Notice of Removal (“Removal
2 Notice”) with respect to the Ross Litigation. (ECF No. 7). Copies of the pleadings and record
3 from the State Court also were filed along with the Removal Notice. (ECF Nos. 7 through 39).⁴
4 According to the State Court record, the original complaint in the Ross Litigation was filed on
5 December 4, 2015, and named numerous individuals and entities as defendants.⁵ Since that time,
6 the universe of additional parties now include counterclaimants, third-party plaintiffs, and third-
7 party defendants, along with the plaintiff, the Debtor, and Rutishauser.⁶ The complaint in the
8 Ross Litigation has been amended on several occasions.⁷

9
10 ⁴ The court separately takes judicial notice under FRE 201 of the papers filed in the Ross
11 Litigation. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg.,
12 LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Green v. Williams, 2012 WL 3962458, at
*1 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv.,
LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

13 ⁵ The original complaint was framed as ten separate causes of action against some or all
14 of the named defendants, including breach of contract, tortious breach of the implied covenant of
15 good faith and fair dealing, fraudulent misrepresentation, breach of fiduciary duty, conspiracy,
16 embezzlement/theft/conversion, unjust enrichment, preliminary and permanent injunctive relief,
accounting, and constructive trust.

17 ⁶ The list of non-debtor parties who currently are or have been involved in the Ross
18 Litigation is extensive: Douglas Ross MD PC, Infuze LLC, Stephen J. Massa, Beau McDougall,
19 Align Chiropractic, Michael H. Hamilton, Esq., Michael Hamilton Attorney at Law LLC, Silver
20 State Lab LLC, Candy Carillo RN (“Carillo”), Carillo is the Debtor’s spouse, Injury Medical
21 Consultants LLC, Align Med (Alfreda) LLC, Align MSO LLC, Ryan Kissing DC, Keith
Quisberg DC, Michael D. Digregorio M.D., Thomas Alfreda Jr. DO, Robert Ingham M.D.,
Shannon Beal, and, Michael Braunstein M.D. These individuals and entities appear on the
register of case information maintained by the clerk of the State Court.

22 ⁷ On September 26, 2017, Ross filed a motion for leave to file an amended complaint.
23 The amended complaint consisted of the original ten separate causes of action and added an
24 additional cause of action for an accounting against several additional named defendants. On
25 November 1, 2017, that motion was granted. On November 6, 2017, a written order granting the
26 motion was entered. On June 15, 2018, Debtor and Rutishauser, filed a second amended answer
27 to the amended complaint, in which they included a counterclaim against Ross alleging seven
28 separate causes of action. The prayer of the counterclaim seeks damages and other relief. On
June 29, 2018, Ross filed a motion for leave to further amend the complaint in the Ross
Litigation. On August 2, 2018, the State Court granted the motion. The proposed second
amended complaint consists of the prior eleven causes of action and adds an additional cause of
action for breach of contract. It does not appear that a written order was entered by the State
Court before the Debtor filed his Petition for Chapter 7 relief.

1 On August 29, 2018, Debtor filed another Notice of Removal with respect to the Ross
2 Litigation, and the removed matter was assigned Adversary Proceeding No. 18-01085-MKN
3 (“Removal Adversary”). (ECF No. 56).⁸

4 On November 13, 2018, Ross filed an adversary complaint to determine dischargeability
5 of debts under Section 523(a)(2) and Section 523(a)(4) (“523 Complaint”), denominated
6 Adversary Proceeding No. 18-01123-MKN (“Ross Non-Dischargeability Action”). (ECF No.
7 86).⁹

8 On November 14, 2018, an order of discharge was entered except with respect to the
9 claims to be resolved in the Ross Non-Dischargeability Action. (ECF No. 87).

10 On November 16, 2018, Ross filed a motion to remand the Ross Litigation to the State
11 Court (“Remand Motion”). (AECF No. 9). That motion was noticed to be heard on December
12 19, 2018. (AECF No. 10).

13 On December 4, 2018, Ross filed a motion seeking relief from the automatic stay
14 (“MRAS”) so that he could proceed with the Ross Litigation in State Court in the event his
15 Remand Motion was granted. The MRAS was noticed to be heard on January 9, 2019. (ECF
16 Nos. 89 and 92).

17 On December 5, 2018, Debtor filed an opposition to the Remand Motion. (AECF No.
18 14).

19 On December 13, 2018, Debtor served the instant Dismissal Motion with respect to the
20 Ross Non-Dischargeability Action, and noticed it to be heard on February 28, 2019, but
21 erroneously filed it in the Removal Adversary. (AECF Nos. 20 and 21).

22 On December 26, 2018, an opposition to the MRAS was filed by Debtor. (ECF No. 99).

23 On January 3, 2019, an order was entered granting the Remand Motion (“Remand
24 Order”). (AECF No. 30).

25
26 ⁸ In this Order, all references to “AECF No.” shall be to the documents filed in the
Removal Adversary.

27
28 ⁹ In this Order, all references to “2AECF No.” shall be to the documents filed in the Ross
Non-Dischargeability Action.

1 On January 3, 2019, Debtor filed another amended petition that no longer includes the
2 separate attachment specifically identifying CAF Medical and Rutishauser as sole
3 proprietorships. (ECF No. 100).¹⁰ Attached to the amended petition is an amended Schedule
4 “A/B,” which does not list any claims or counterclaims against third parties.

5 On January 4, 2019, a reply in support of the MRAS was filed by Ross. (ECF No. 101).

6 On January 9, 2019, Debtor filed a motion to reconsider the Remand Order (“Remand
7 Reconsideration Motion”). (AECF No. 34). That motion was noticed to be heard on February
8 28, 2019. (AECF No. 35).¹¹

9 On January 23, 2019, an order was entered granting the MRAS (“RAS Order”). (ECF
10 No. 104).

11 On February 6, 2019, Debtor filed a motion to reconsider the RAS Order (“RAS
12 Reconsideration Motion”). (ECF No. 108). That motion was noticed to be heard on March 13,
13 2019. (ECF No. 109).

14 On February 14, 2019, Debtor re-filed the instant Dismissal Motion in the Ross Non-
15 Dischargeability Action. (2AECF No. 7). The motion was re-noticed to be heard on February
16 28, 2019. (2AECF No. 8).

17 On February 18, 2019, Ross filed an opposition to the Remand Reconsideration Motion.
18 (AECF No. 39).

19 On February 18, 2019, Ross also filed an opposition to the instant Dismissal Motion
20 (“Opposition”). (2AECF No. 14). In support of that Opposition, Ross also filed his declaration
21 (“Ross Declaration”). (2AECF No. 15).

23 ¹⁰ On December 18, 2018, Debtor filed a voluntary Chapter 7 petition on behalf of
24 Rutishauser. The court previously concluded that the Debtor’s interest in Rutishauser is property
25 of his bankruptcy estate and that he had no authority to file that petition. Moreover, the court
26 also concluded that the filing of the Rutishauser petition was in violation of the automatic stay
and therefore void. See Remand Order at 4-5.

27 ¹¹ At the hearing on the MRAS, counsel for the Debtor represented that the entity
28 Rutishauser was erroneously identified as a sole proprietorship in the prior amended bankruptcy
petition because of an error caused by the Debtor’s bankruptcy counsel.

1 On February 21, 2019, Debtor filed a reply in support of his Remand Reconsideration
2 Motion. (AECF No. 44).

3 On February 21, 2019, Debtor filed a reply in support of the instant Dismissal Motion.
4 (2AECF No. 17).

5 On February 27, 2019, Ross filed an opposition to the RAS Reconsideration Motion.
6 (ECF No. 114).

7 DISCUSSION¹²

8 The 523 Complaint is framed as three separate claims for relief. Paragraphs 7 though 91
9 contain a litany of factual allegations describing the transactions between Ross and the Debtor
10 that give rise to both the Ross Litigation and the instant non-dischargeability proceeding. The
11 First Claim in the 523 Complaint is brought under Section 523(a)(2)(A) and asserts that the
12 Debtor obtained money and services from Ross through false pretenses, false representations,
13 and actual fraud. See 523 Complaint at ¶¶ 94, 95. It alleges that the Debtor made material
14 misrepresentations concerning Rutishauser, which was doing business as NLV Pain Management
15 and Urgent Care. Id. at ¶ 96. It also asserts that the Debtor omitted disclosure of material factual
16 information to induce Ross into financial transactions with the Debtor. Id. at ¶ 97. The claim
17 further alleges that the Debtor concealed that he owned interests in competing entities to which
18 the Debtor was diverting patients from Rutishauser. Id. at ¶ 98. The Second Claim is brought
19 under Section 523(a)(4) and asserts that the Debtor was embezzling funds from Rutishauser, see
20 523 Complaint at ¶¶ 107, 108, 109, 110, 111, 112, 113, thereby causing damage to Ross. Id. at ¶
21 114.¹³ The Third Claim is brought under Section 523(a)(2)(B) and alleges that the Debtor

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23 ¹² The Remand Reconsideration Motion was heard on the same date as the instant
24 Dismissal Motion. The Remand Reconsideration Motion is the subject of a separate order
entered contemporaneously herewith.

25 ¹³ In the Second Claim, Ross also alleges that he sustained damages as a result of the
26 Debtor's "fraud and defalcation while acting as a fiduciary." See 523 Complaint at ¶ 114.
27 Debtor maintains that he is not a fiduciary within the meaning of Section 523(a)(4), because
28 there was no express trust arrangement or applicable statute that created a fiduciary relationship
between members of the limited liability company. See Dismissal Motion at 13:6 to 15:9. In
response, Ross argues that under Paragraph 25 of the Operating Agreement, members are liable
to each other if they engage in "fraud, deceit, gross negligence, willful misconduct, or a wrongful

1 provided statements in writing to Ross that included false information respecting the financial
2 condition of Rutishauser. See 523 Complaint at ¶¶ 119, 120, 121, 122. It also alleges that
3 Rutishauser is an insider of the Debtor, id. at ¶ 125, that Ross reasonably relied on the written
4 information, id. at ¶ 126, and that Ross suffered damages as a result. Id. at ¶ 128.

5 Debtor seeks to dismiss the 523 Complaint pursuant to Rule 12(b)(6) and Rule 23.1, or,
6 alternatively, to obtain summary judgment pursuant to Rule 56. See Dismissal Motion at 1:28 to
7 2:3. Rule 12(b)(6) and Rule 23.1 govern the allegations required to be pled by the plaintiff to
8 state a claim; when applicable, Rule 56 requires entry of a judgment on the merits of a claim.

9 Rule 12(b)(6) requires a complaint to be dismissed if its allegations “fails to state a claim
10 for which relief may be granted.” The Supreme Court has instructed that “To survive a motion
11 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to
12 relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotations
13 omitted), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial
14 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
15 inference that the defendant is liable for the misconduct alleged.” Id. In considering a motion
16 under Rule 12(b)(6), the court accepts as true all factual allegations made by, and draws all
17 reasonable inferences in favor of, the plaintiff. See Dowers v. Nationstar Mortg., LLC, 852 F.3d
18 964, 969 (9th Cir. 2017), citing Ashcroft, 556 U.S. at 678. Dismissal is appropriate if there is “a
19 lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
20 legal theory.” Id.

21 Rule 23.1 applies when a complaint alleges “derivative claims” that seek to enforce rights
22 that may be asserted by a corporation or association but has failed to enforce. The rule requires a
23 complaint alleging a derivative claim to be verified, and to: “(1) allege that the plaintiff was a
24 shareholder or member at the time of the transaction complained of...; (2) allege the action is not
25 _____
26 taking.” Opposition at 11:8-24. Neither Ross nor the Debtor has offered authority under Nevada
27 law addressing whether the terms of an operating agreement for a limited liability company
28 creates an express trust arrangement. Drawing all reasonable inferences in favor of Ross, the
court cannot conclude that there is no plausible basis to conclude that an express trust agreement
is absent. If Ross pursues this theory, rather than or in addition to an embezzlement theory at
trial, he will have to meet this threshold.

1 a collusive one to confer jurisdiction that the court otherwise would lack; and (3) state with
2 particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or
3 comparable authority...; and (B) the reasons for not obtaining the action or making the effort.”
4 FED.R.CIV.P. 23.1(b).

5 Rule 56 requires entry of a judgment in favor of the moving party that demonstrates that
6 there are no genuine disputes of material fact and that the party is entitled to judgment as a
7 matter of law. The party moving for summary judgment bears the burden of demonstrating the
8 absence of any genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322
9 (1986). For summary judgment purposes, a fact is “material” if it might affect the result of the
10 suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
11 248 (1985). A genuine issue of material fact exists when “the evidence is such that a reasonable
12 jury could return a verdict for the nonmoving party.” Id. The moving party’s evidence is judged
13 by the same standard of proof applicable at trial. See Celotex Corp. v. Catrett, 477 U.S. at 323.
14 Determinations of intent or credibility are generally ill-suited for disposition by summary
15 judgment. See Fogel Legware, etc. v. Wills (In re Wills), 243 B.R. 58, 65 (B.A.P. 9th Cir.
16 1999).

17 The court having considered the written and oral arguments of counsel, as well as the
18 record provided, concludes that the Dismissal Motion must be denied in all respects, including
19 the alternative request for summary judgment.

20 First, all three claims are sufficiently pled to meet the requirements of Rule 12(b)(6). The
21 general allegations of the 523 Complaint contain factual details which, if true, are sufficient to
22 state claims that are plausible under Section 523(a)(2)(A), Section 523(a)(4), and Section
23 523(a)(2)(B).

24 Second, all three claims are sufficiently pled to meet the requirements of Rule 23.1 under
25 the circumstances of this case. Even if Rutishauser could assert claims against the Debtor for the
26 same alleged misconduct that underlies the Second Claim and Third Claim in the 523 Complaint,
27 Debtor’s conduct in these bankruptcy proceedings demonstrate why dismissal under Rule 23.1 is
28 inappropriate. This court previously determined that the Debtor filed a voluntary Chapter 7

1 petition for Rutishauser even though he never had authority to do so. See discussion at note 10,
2 supra.¹⁴ More important, Debtor filed Schedules for Rutishauser that he signed under penalty of
3 perjury. (Rutishauser ECF No. 1). In the most recent, amended property Schedule “A/B”
4 (Rutishauser ECF Nos. 7 and 8), Debtor attests that Rutishauser only has a claim against Ross,
5 and no “causes of action against third parties (whether or not a lawsuit has been filed).” In
6 essence, Debtor has attested under penalty of perjury that Rutishauser has no derivative claims
7 against the Debtor. Under these circumstances, it is readily apparent that Ross has no reason to
8 request Rutishauser to pursue claims against the Debtor.¹⁵ The pleading requirements for a
9 derivative action, if at all, particularly under Rule 23.1(b)(3)(B), are sufficiently met.

10 Third, Debtor has failed to meet his threshold burden under Rule 56(a) of demonstrating
11 that there are no genuine issues of material fact. Debtor attaches seven exhibits to his Dismissal
12 Motion consisting of various tax returns, bank statements, and other documents concerning the
13 operation of Rutishauser. Also attached to the Dismissal Motion is a Declaration of Jairo
14 Rodriguez in which he attests, *inter alia*, that he “did not make any false statements, false
15 pretenses, false representations, or commit any fraud,” id. at ¶¶ 31 and 32, that he does “not have
16 any fiduciary relationship with, or fiduciary duty,” id. at ¶ 33, that he “did not steal or embezzle
17 any money or other property,” id. at ¶ 34, and that he “did not make any false statements
18 regarding the financial condition of [Rutishauser].” Id. at ¶ 41. An opportunity to conduct
19 discovery as to the matters encompassed by the exhibits attached to the Dismissal Motion, as
20 well as the statements made in the Rodriguez Declaration, has been requested by Ross. See Ross
21 Declaration at ¶ 4. Although that request is appropriate under Rule 56(d), it is unnecessary to
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24 ¹⁴ The voluntary petition that the Debtor signed under penalty of perjury on behalf of
25 Rutishauser was filed on December 18, 2018. In response to Question 10 of that petition, Debtor
26 attested that there were no bankruptcy cases pending by a business partner or affiliate of
27 Rutishauser. Debtor attests, however, that he owns a controlling interest in Rutishauser, see note
2, supra, making him an affiliate of Rutishauser under Section 101(2). It is not clear how the
Debtor could deny the existence of a pending bankruptcy by an affiliate of Rutishauser when he
is the affiliate in his own bankruptcy proceeding at the time he signed the Rutishauser petition.

28 ¹⁵ This, of course, illustrates exactly why the Debtor had no authority to file the Chapter 7
proceeding for Rutishauser.

1 grant the request at this stage because the credibility of the Debtor's statements in his
2 declaration, and his intent at issue in the claims asserted under Sections 523(a)(2) and 523(a)(4),
3 are unsuited to resolution by summary judgment.

4 Based on the foregoing, the Dismissal Motion under Rule 12(b)(6) and Rule 23.1, as well
5 as the alternative request for summary judgment under Rule 56, will be denied. Additionally,
6 because the Ross Litigation has been remanded to the State Court, and relief from stay has been
7 granted for the Ross Litigation to proceed to judgment, all discovery and any other matters in the
8 instant non-dischargeability proceeding will be stayed until the conclusion of the Ross Litigation.

9 **IT IS THEREFORE ORDERED** that the Motion to Dismiss; or Alternatively, Motion
10 for Summary Judgment, brought by defendant Jairo Alejandro Rodriguez, Adversary Docket No.
11 7, be, and the same hereby is, **DENIED**.

12 **IT IS FURTHER ORDERED** that all discovery, as well as any further matters in the
13 above-captioned adversary proceeding, are **STAYED** until completion of the civil action styled
14 as Douglas B. Ross, M.D. v. Jairo Rodriguez, PAC, et al., Case No. A-15-728577-B, pending in
15 the Eighth Judicial District Court, Clark County, Nevada. Upon entry of a judgment in that civil
16 action, or other conclusion of the matter with respect to the above-captioned debtor, plaintiff in
17 this adversary proceeding shall serve and file a status report before this court, as well as a notice
18 of status hearing. Plaintiff's counsel shall contact the courtroom deputy to obtain an appropriate
19 date for the status hearing.

20 **IT IS SO ORDERED.**

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22 Copies sent via CM/ECF ELECTRONIC FILING

23 Copies sent via BNC to:
24 JAIRO ALEJANDRO RODRIGUEZ
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