Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
December 20, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 18-12600-MKN
	)	Chapter 7 Involuntary
ALIYA MEDCARE FINANCE LLC,	)	
	)	Date: November 6, 2018
Alleged Debtor.	)	Time: 9:30 a.m.
	)	

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT AS TO THE INVOLUNTARY PETITION AND ENTRY OF ORDER FOR RELIEF[1]

On November 6, 2018, the court heard the Motion for Summary Judgment as to the Involuntary Petition and Entry of Order for Relief ("SJ Motion") brought by petitioning creditor Credit Saison Co., Ltd. ("Credit Saison"). The court also heard the Counter Motion to the Alleged Creditor's Motion for Summary Judgment ("Countermotion") brought by alleged debtor Aliya Medcare Finance LLC ("AMF"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On May 3, 2018, an involuntary Chapter 7 bankruptcy petition ("Involuntary Petition") against AMF was filed by Credit Saison. (ECF No. 1).

On June 29, 2018, AMF filed a Motion to Dismiss Involuntary Petition, or, in the Alternative, to Abstain, and Reservation of Rights under 11 U.S.C. § 303(i). ("Dismissal

[1] In this Order, all references to "ECF No." are to the numbers 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 "FRCP" are to the Federal Rules of Civil Procedure.

Motion") (ECF No. 11).

On August 1, 2018, Credit Saison filed an opposition to the Dismissal Motion. (ECF No. 15).

On August 14, 2018, AMF filed its reply in support of its Dismissal Motion. (ECF No. 18).

On September 11, 2018, Credit Saison filed the instant SJ Motion, accompanied by a Statement of Undisputed Facts ("SUF"), to which is attached twelve exhibits alphabetically marked "A" through "L." ("Credit Saison Ex."). (ECF Nos. 21, 22). Also accompanying the SJ Motion is the Declaration of Richard G. Barrier ("Barrier Declaration"). (ECF No. 23).

On October 15, 2018, AMF filed an opposition to the SJ Motion that included its Countermotion ("Opposition"). (ECF No. 44). Attached to the Opposition is the Declaration of Erik Nord ("Nord Declaration"), to which is attached seven exhibits alphabetically marked "A" through "G" ("AMF Ex.").

On October 29, 2018, Credit Saison filed a reply in support of the SJ Motion, and in opposition to the Countermotion. (ECF No. 45).

DISCUSSION

Credit Saison is the only petitioning creditor. In Section 11 of the Involuntary Petition, Credit Saison alleges that AMF "is generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount." In Section 13, Credit Saison alleges that it has a claim based on a "Guaranty of promissory notes" and that the value of its claim is $21,679,902. The promissory notes referenced in Section 13 consist of two separate amended secured notes dated March 27, 2014, both in favor of Credit Saison in the principal amount of one billion Japanese Yen and with a maturity date of December 20, 2015. One note was executed by Aliya Investment Group LLC ("AIG I") and the other was executed by Aliya Investment Group II LLC ("AIG II"). (AMF Ex. "A"; Credit Saison Ex. "C."). To secure the repayment of the two amended notes, AIG I and AIG II entered into a Security Agreement dated March 27, 2014 ("Security Agreement"), where they granted Credit Saison a perfected security

interest in certain "Assets" defined under the agreement. (AMF Ex. "B"; Credit Saison Ex. "A").[2]

The guaranty referenced in Section 13 of the Involuntary Petition consisted of a document entitled "Guaranty of Performance of Certain Terms of Security Agreement" dated March 27, 2014, executed by AMF in favor of Credit Saison ("Guaranty"). (AMF Ex. "C"; Credit Saison Ex. "D").[3] As indicated by its title, the Guaranty applied to only certain terms of the Security Agreement. Paragraph 1 of the Guaranty provides as follows:

> [AMF] does hereby guaranty in full, compete, due and punctual performance by [AIG I and AIG II] of all the terms, covenants, conditions and obligations assumed and/or made by [AIG I and AIG II] as set forth in the second and third sentences of paragraph 3 of the Security Agreement (the "Guaranteed Obligations"). For the avoidance of doubt, Credit Saison agrees that [AMF] shall not be responsible for, or held liable for, any terms, covenants, conditions and/or obligations under the Security Agreement, the AIG Note or the AIG II Note, except those specifically set forth in the Guaranteed Obligations. Credit Saison further agrees that no owner, member, manager, director, officer, employee agent, or other representative of [AMF] shall have any obligation, responsibility or liability under this Guaranty, the Security Agreement, the AIG Note and/or the AIG II Note in such capacity.

(Emphasis added). This language refers only to the second and third sentences of paragraph 3 of the Security Agreement. Paragraph 3 of the Security Agreement, in its entirety, provides as follows:

> 3. Assets. In addition to the perfected security interest evidence by the Financing Statement, [AIG I and AIG II] hereby authorizes Credit Saison to file a UCC financing statement covering the Assets (as that term is defined herein), with [AIG I and AIG II] as the debtor and Credit Saison as the creditor/secured party, with the Nevada Secretary of State, the California Secretary of State, and/or any other appropriate filing office. [AIG I and AIG II] represents and warrants that as of the date hereof the aggregate face amount of the Assets is not less than

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[2] The two exhibits are identical. Neither party suggests that there is a different version of the written Security Agreement that could be presented. The language of the Security Agreement is not disputed.

[3] The two exhibits are identical. Neither party suggests that there is a different version of the written Guaranty that could be presented. The language of the Guaranty is not disputed. The two amended promissory notes, the Security Agreement, and the Guaranty, are all signed by Robert C. Benson, as manager of AIG I, AIG II, and AMF. Additionally, each of the documents are acknowledged and accepted by Hiroshi Rinno, as President and CEO of Credit Saison.

> U.S. Forty Eight Million Dollars (U.S. $48,000,000). Subject to the other terms and conditions herein, [AIG I and AIG II] **shall procure that,** at all times while this Agreement remains in effect, the aggregate face amount of the Assets in JP ¥ [as converted at the TTM (meaning the average of the TTS and TTB; hereinafter the same) as of the last trading date that is published at the website of Mizuho Bank, Ltd.] shall be at least One Billion Japanese Yen (JP ¥ 1,000,000,000) more than the then outstanding amount of the Secured Obligations (as described in Exhibit A) until Credit Saison authorizes in writing that the Assets may be of a lesser combined value or Credit Saison acknowledges in writing that the Secured Obligations have been paid in full.

(Emphasis added). The term "Assets" is defined in Paragraph 1 of the Security Agreement "to mean all present and future right, title and interest of [AIG I and AIG II] in or to any Health-Care-Insurance Receivables (commonly referred to as "Medical Liens") which to [AIG I and AIG II]'s knowledge after commercially reasonable inquiry, are, taken as a whole, substantially collectible for the purpose of repaying the amounts due under the Notes." (Emphasis added).[4]

AMF's liability to Credit Saison under the Guaranty and the amount of any debt has not been adjudicated in any court prior to the filing of the Involuntary Petition. AMF's liability to Credit Saison under the Guaranty also is not the subject of adjudication in any proceeding currently pending in any court of competent jurisdiction in the State of Nevada.[5]

Absent a prior judgment in any amount determining AMF's liability under the Guaranty, Credit Saison now brings the instant SJ Motion, seeking a determination as a matter of law that AMF is in breach of the Guaranty. In contrast, AMF seeks a determination that its liability under the Guaranty, or the amount of any debt, is in bona fide dispute, requiring the Involuntary Petition to be dismissed.

I. Summary Judgment Standards.

A motion for summary judgment is governed by FRCP 56. See Silva v. Smith's Pac.

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[4] Under UCC § 9-102(a)(46), a "'Health-care-insurance receivable' means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided or to be provided." Nev. Rev. Stat. 104.9102(1)(ss).

[5] Paragraph 6 of the Guaranty provides that it will be governed by Nevada law and that only courts in Nevada have jurisdiction to adjudicate any disputes. Paragraph 21(A) of the Security Agreement contains similar language. In its Dismissal Motion, AMF includes an alternative request that the court abstain under Section 305(a). Because there is no other proceeding pending between the parties, however, abstention would not be appropriate.

Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995).[6] The United States District Court for the District of Nevada discussed the standards applicable to summary judgment motions as follows:

> "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *See id.* at 250–51. "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.' " *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).
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> The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

[6] FRCP 56 applies in both adversary proceedings and contested matters. See Fed.R.Bankr.P. 7056 and 9014(c).

RA Southeast Land Co. LLC v. First Am. Title Ins. Co., 2016 WL 4591740, at *2 (D. Nev. Sept. 2, 2016).

II. The Requirements for Involuntary Relief.

Under Section 303(a), an involuntary Chapter 11 case may be commenced against a corporation only if the corporation may be a debtor under Chapter 11. Under Section 303(b), an involuntary petition may be filed "by three or more entities, each of which is . . . a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount . . . if such noncontingent, undisputed claims aggregate at least $15,775 more than the value of any lien on property of the debtor . . ." 11 U.S.C. § 303(b)(1) (emphasis added). Alternatively, "if there are fewer than 12 such holders," then an involuntary petition may be filed "by one or more of such holders" that hold an aggregate debt of at least $15,775. 11 U.S.C. § 303(b)(2) (emphasis added). "Since section 303(b)(1) requires that claims not be contingent as to liability or the subject of bona fide dispute as to liability or amount, those requirements also apply to the holders referred to in section 303(b)(2)." See 2 COLLIER ON BANKRUPTCY, ¶ 303.14[3] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2017).

If the alleged debtor contests the allegations of an involuntary petition, an order for relief is entered only if the debtor is "generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount." 11 U.S.C. § 303(h)(1) (emphasis added). Involuntary petitions typically are contested, if at all, over whether the alleged debtor is "generally not paying" its debts, see, e.g., Hayes v. Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 779 F.2d 471, 475 (9th Cir. 1985), or, whether the unpaid debts "are the subject of a bona fide dispute." See, e.g., Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.), 277 F.3d 1057, 1066-70 (9th Cir. 2002). There may be an admixture of both contests because a bona fide dispute as to the liability or amount of a debt arguably means that the alleged debt is not currently due at all. See generally 2 COLLIER ON BANKRUPTCY, supra, at ¶ 303.11.

Like many circuits, the Ninth Circuit applies a "totality of the circumstances" approach to whether an alleged debtor is generally not paying its debts when due. See Vortex Fishing, 277

F.3d at 1072. Under this approach, the court should consider a variety of factors, including the number of unpaid claims, the amount of the unpaid claims, the materiality of the nonpayments, and the debtor's overall conduct of its financial affairs. See In re Datacom Systems, Inc., Case No. 14-11096-ABL, Memorandum and Order Regarding Involuntary Petition and Motion to Dismiss, Docket No. 228, at 29 (Bankr. D. Nev. June 25, 2015), citing Laxmi Jewel, Inc. v. C & C Jewelry Mfg., Inc. (In re C & C Jewelry Mfg., Inc.), 2001 WL 36340326, at *12 (B.A.P. 9th Cir. Apr. 14, 2009). See, e.g., In re Int'l Teldata Corp., 12 B.R. 879, 883 (Bankr. D. Nev. 1981) (payment of significant long-term debts versus periodic payment of small debts); In re St. Marie Dev. Corp. of Montana, Inc., 334 B.R. 663, 671 (Bankr. D. Mont. 2005) (number of creditors and amount due).

Like most federal circuits, the Ninth Circuit finds a "bona fide dispute" where "there is an objective basis for either a factual or legal dispute as to the validity of a debt." See Vortex Fishing, 277 F.3d at 1064. A "bona fide dispute as to liability" exists "if there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts.'" Id. (citation and footnote omitted). The same objective test applies for determining a bona fide dispute as to the amount of a debt. See Marciano v. Chapnick (In re Marciano), 708 F.3d 1123, 1126 (9th Cir. 2013). A bona fide dispute as to any amount of the petitioning creditor's claim also disqualifies the claim under Section 303(b). See Montana Dept. of Revenue v. Blixseth, 581 B.R. 882, 903 (D. Nev. 2017).[7]

III. Bona Fide Disputes Exist as to Liability and Amount of the Claim of the Only Petitioning Creditor.

Paragraph 1 of the Guaranty obligates AMF to perform the terms set forth only in the second and third sentences of Paragraph 3 of the Security Agreement. As quoted above, the second sentence of that paragraph is unambiguous and both AIG I and AIG II simply warrant the "aggregate face amount of the Assets" as of the date the Security Agreement was executed, i.e.,

[7] There may be circumstances where a "genuine dispute" of material fact does not exist for summary judgment purposes, but a "bona fide dispute" as to liability or amount of a petitioning creditor's claim does exist. See In re EB Holdings II, Inc., 589 B.R. 704, 724 n.64 (Bankr. D. Nev. 2017).

March 27, 2014. No one suggests that AIG I or AIG II breached that warranty provision.

The third sentence of Paragraph 3 of the Security Agreement, however, is ambiguous on its face. As quoted above, the eleventh word in that sentence is "procure." In context, the third sentence states in relevant part that "[AIG I and AIG II] **shall procure that**, at all times while this Agreement remains in effect, the aggregate face amount of the Assets…shall be at least One Billion Japanese Yen…more than the then outstanding amount of the Secured Obligations…" (Emphasis added). But what exactly is the obligation of AIG I and AIG II under this third sentence? The common definition of the word "procure" is to "obtain" or "get possession" of something. See Merriam-Webster, https://www.merriam-webster.com/dictionary/procure (last visited Dec. 20, 2018). The common definition gives little meaning to the other words in the sentence when the operative command is for AIG I and AIG II to "procure that." Did the parties to the Security Agreement intend for AIG I and AIG II to obtain or get possession of a certain value of medical insurance receivables in excess of the amounts owed on the promissory notes? On its face, however, use of the word "obtain" followed by the word "that" would still be grammatically incorrect, and the remaining language in the sentence does not affirmatively require AIG I and AIG II to obtain or get possession of medical insurance receivables having a particular face amount more than the amount owed under the promissory notes. Or did the parties intend that the face amount of the medical insurance receivables would be certain to have a value significantly greater than the amounts owed on the promissory notes? If that was the intention, it appears that the eleventh word in the third sentence should have been "ensure" rather than "procure."[8] Requiring AIG I and AIG II to "ensure that" the face amount of the receivables would be at least a certain amount would have made more sense both grammatically and contextually. Unfortunately, that word was not used in the sentence. Moreover, neither the Barrier Declaration nor the Nord Declaration explain the performance required of AIG I and AIG II by the third sentence of Paragraph 3 of the Security Agreement, which in turn, allegedly was

[8] The common meaning of the word "ensure" is to make "sure," or "certain", or "safe." See Merriam-Webster, https://www.merriam-webster.com/dictionary/ensure (last visited Dec. 20, 2018).

guaranteed by AMF under Paragraph 1 of the Guaranty.[9]

Additionally, as quoted above, both the second sentence and the third sentence of Paragraph 3 include the words "the aggregate face amount of the Assets." AMF maintains that the aggregate face amount of the Assets, i.e., the rights to various medical insurance receivables, was $36,042,801.39 as of December 31, 2017, which exceeded the amounts owed to Credit Saison on the promissory notes by more than One Billion Japanese Yen. See Nord Declaration at ¶¶ 8, 23 and 9 (page 6). AMF further maintains that any prior representations as to the collectability of the medical insurance receivables is "inherently speculative." Id. at ¶ 19 (page 8).[10] In other words, AMF implies that even if the word "ensure" is substituted for the word "procure," AIG I and AIG II were not in breach of the third sentence of the Security Agreement. Credit Saison, however, relies in part on the definition of "Assets" found in Paragraph 1 of the Security Agreement, which includes the words "substantially collectible for the purpose of repaying the amounts due under the Notes." Credit Saison maintains that AMF admitted in January 2018 that: (1) the aggregate face amount of the receivables was $7,540,433, and (2) that the actual collectible amount of the medical insurance receivables was $1,131,000. See SUF ¶ 21 and ¶ 24, and Credit Saison Ex. G. Because Credit Saison asserts that it is owed more than $21.6 million, see SUF ¶ 30, it argues that both the aggregate face amount of the Assets and the actual collectible amount of the medical insurance receivables is far less than the amount

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[9] AMF represents that the promissory notes, Security Agreement, and Guaranty were drafted and negotiated through counsel for Credit Saison. See Nord Declaration at ¶¶ 9-12. There does not appear to be an integration clause nor a construction clause in either the Security Agreement or the Guaranty. AMF also represents that Credit Saison sought AMF's agreement in 2015 to become a party to the Security Agreement, rather than only a performance guarantor of the second and third sentences of Paragraph 3. See Nord Declaration at ¶ 22 & AMF Ex. E.

[10] Apparently, AMF is the holder of a June 12, 2017, judgment totaling $14,600,000 against an entity known as Comprehensive Toxicology Billing, LLC, arising out of a lawsuit in the Central District of California, denominated Case No. LACV 14-07806-VAP. See AMF Ex. F. That judgment was based on a jury finding of conversion by Comprehensive Technology of certain medical insurance receivables that it had sold to AMF. See Nord Declaration at ¶ 13 (page 7). That litigation apparently has been completed and Credit Saison was never a party even though the Assets under the Security Agreement may have been encompassed by the lawsuit.

required under the third sentence of Paragraph 3.

Credit Saison's legal position, however, exposes a further ambiguity in the document. It is not entirely clear to the court why Paragraph 3 of the Security Agreement would refer to the "face amount" of the medical insurance receivables, while the definition of Assets in Paragraph 1 makes no reference at all to their face amount, but instead refers to receivables that are "substantially collectible." Instead of expressing a loan-to-value requirement typical of other secured transactions, the third sentence refers to the aggregate face amount of medical insurance receivables that must be at least One Billion Japanese Yen in excess of any outstanding amount that is owed. Apparently, under Credit Saison's view, even if the balance owed by AIG I and AIG II on the promissory notes was the equivalent of One Thousand Japanese Yen, the medical lien receivables had to have a collectible value of at least One Billion One Thousand Japanese Yen. Not surprisingly, AMF reserves its ability to raise defenses to any such legal result. See Opposition at 2 n.2.

Based on the foregoing, the court concludes that there is a genuine dispute of material fact as to the aggregate face amount of the Assets securing the obligations of AIG I and AIG II under the promissory notes, as well as the collectability of the medical insurance receivables. There also is a genuine dispute of material fact as to the obligation of AIG I and AIG II under the third sentence of Paragraph 3 of the Security Agreement. As a result, there also is a genuine dispute of material fact as to the liability and amount owed, if any, by AMF under the Guaranty.

The court also concludes that there is no genuine dispute of material fact as to the language of the Security Agreement as well as the language of the Guaranty. Because the obligation of AIG I and AIG II under the third sentence of Paragraph 3 of the Security Agreement is ambiguous, the performance obligation of AMF under Paragraph 1 of the Guaranty also is ambiguous. As a result, the court concludes that the claim of Credit Saison against AMF is subject to bona fide dispute as to both liability and amount within the meaning of Section 303(b)(2) and 303(h)(1).

IT IS THEREFORE ORDERED that the Motion for Summary Judgment as to the Involuntary Petition and Entry of Order for Relief brought by petitioner Credit Saison Co., Ltd.,

Docket No. 21, be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED that the Counter Motion for Summary Judgment brought by alleged debtor Aliya Medcare Finance LLC, Docket No. 44, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED that the above-captioned involuntary proceeding is **DISMISSED**, subject to the reservation of this court's jurisdiction to award relief, if any, to the alleged debtor under 11 U.S.C. § 303(i).[11]

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[11] Nothing in this order constitutes a finding that the Involuntary Petition was filed in bad faith within the meaning of Section 303(i)(2).