


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
January 23, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:) Case No.: 18-14694-MKN
) Chapter 7
JAIRO ALEJANDRO RODRIGUEZ,)
fdba RUTISHAUSER, LLC DBA NLV PAIN)
MANAGEMENT & URGENT CARE,) Date: January 9, 2019
dba CAF MEDICAL, LLC DBA INJURY &) Time: 1:30 p.m.
CHRONIC PAIN CENTER,)
dba INJURY MEDICAL CONSULTANTS,)
LLC.,)
)
)
Debtor.)

**ORDER REGARDING MOTION FOR RELIEF FROM AUTOMATIC STAY TO
PROCEED WITH STATE COURT ACTION¹**

On January 9, 2019, the court heard the Motion for Relief from Automatic Stay to Proceed With State Court Action (“MRAS”) brought by Douglas Ross, M.D. (“Ross”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On August 6, 2018, Jairo Alejandro Rodriguez (“Debtor”) filed a “skeleton” voluntary Chapter 7 petition (“Petition”). (ECF No. 1). On the same date, a notice of the Chapter 7 filing

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 “AECF No.” are to the numbers assigned to the documents filed in certain adversary proceedings discussed in this Order, as such documents appear on the adversary docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRE” are to the Federal Rules of Evidence.

1 (“Bankruptcy Notice”) was issued scheduling a meeting of creditors for September 13, 2018, and
2 notifying creditors of the appointment of a Chapter 7 trustee. (ECF Nos. 40 and 44). The
3 Chapter 7 proceeding was assigned for administration to a panel Chapter 7 trustee, Lenard E.
4 Schwartzer (“Trustee”). Debtor’s schedules of assets and liabilities (“Schedules”) and statement
5 of financial affairs (“SOFA”), and other required information were filed on August 17, 2018.
6 (ECF No. 46).

7 On Debtor’s SOFA, he lists a breach of contract action entitled “Douglas B. Ross, M.D.
8 vs. Jairo Rodriguez, PAC, A-15-728577-B” (“State Court Action”). Both the Schedules and
9 SOFA are signed by the Debtor under penalty of perjury. According to his Schedule A/B,
10 Debtor has an interest in the following entities: CAF Medical, LLC dba Injury & Chronic Pain
11 Center (“CAF Medical”), Rutishauser, LLC dba NLV Pain Management & Urgent Care
12 (“Rutishauser”), Injury Medical Consultants, and Elite Firearms and Tactical, LLC.² He attests
13 that the value of his interests in all of the entities is \$0.00. Debtor also lists an interest in unpaid
14 wages of approximately \$550,000 owed to him by Rutishauser. In his Schedule A/B, he also
15 attests that he has no claims against third parties, nor any contingent and unliquidated claims of
16 any nature, including counterclaims and rights to set off claims. According to his SOFA, Debtor
17 was the subject of two lawsuits pending at the time he filed his Petition: Douglas B. Ross, M.D.
18 v. Jairo Rodriguez, PAC, et al., Case No. A-15-728577-B (“Ross Litigation”), and Michael
19 Ladner v. Jairo Rodriguez, M.D., NLV Pain Management & Urgent Care, Case No. A-18-
20 767642-C. Both lawsuits were filed in the Eighth Judicial District Court, Clark County, Nevada
21 (“State Court”).

22 On the same date he filed his Petition, Debtor also filed a Notice of Removal (“Removal
23 Notice”) with respect to the Ross Litigation. (ECF No. 7). Copies of the pleadings and record
24 from the State Court also were filed along with the Removal Notice. (ECF Nos. 7 through 39).³

25 ² On the same date, Debtor filed an amendment to his Petition that included an
26 attachment specifically identifying CAF Medical and Rutishauser as sole proprietorships and as
27 health care businesses within the meaning of Section 101(27A). (ECF No. 48).

28 ³ The court separately takes judicial notice under FRE 201 of the papers filed in Ross
Litigation. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg.,

1 According to the State Court record, the original complaint in the Ross Litigation was filed on
2 December 4, 2015, and named numerous individuals and entities as defendants.⁴ Since that time,
3 the universe of additional parties now include counterclaimants, third-party plaintiffs, and third-
4 party defendants, along with the plaintiff, the Debtor, and Rutishauser.⁵ The complaint in the
5 Ross Litigation has been amended on several occasions.⁶

6 On August 17, 2018, Debtor filed an amended petition along with a statement of current
7 monthly income. (ECF Nos. 48 and 49).

8 On August 29, 2018, Debtor filed another Notice of Removal with respect to the Ross
9 Litigation, and the removed matter was assigned Adversary Proceeding No. 18-01085-MKN

10 LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams, 2012 WL 3962458, at *1
11 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC
12 Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

13 ⁴ 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,
17 accounting, and constructive trust.

18 ⁵ The list of non-debtor parties who currently are or have been involved in the Ross
19 Litigation is extensive: Douglas Ross MD PC, Infuze LLC, Stephen J. Massa, Beau McDougall,
20 Align Chiropractic, Michael H. Hamilton, Esq., Michael Hamilton Attorney at Law LLC, Silver
21 State Lab LLC, Candy Carillo RN (“Carillo”), Injury Medical Consultants LLC, Align Med
22 (Alfreda) LLC, Align MSO LLC, Ryan Kissing DC, Keith Quisberg DC, Michael D. Digregorio
23 M.D., Thomas Alfreda Jr. DO, Robert Ingham M.D., Shannon Beal, and, Michael Braunstein
24 M.D. Carillo is the Debtor’s spouse. These individuals and entities appear on the register of case
25 information maintained by the clerk of the State Court.

26 ⁶ On September 26, 2017, Ross filed a motion for leave to file an amended complaint.
27 The amended complaint consisted of the original ten separate causes of action and added an
28 additional cause of action for an accounting against several additional named defendants. On
November 1, 2017, that motion was granted. On November 6, 2017, a written order granting the
motion was entered. On June 15, 2018, Debtor and Rutishauser, filed a second amended answer
to the amended complaint, in which they included a counterclaim against Ross alleging seven
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 (“Removal Adversary”). (ECF No. 56).

2 On October 31, 2018, the Trustee filed and served a notice of assets and instructions for
3 creditors to file proofs of claim no later than January 29, 2019 (“Trustee Asset Notice”). (ECF
4 No. 83).

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

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 in the Removal Adversary a motion to remand the
11 Ross Litigation to the State Court (“Remand Motion”). (AECF No. 9). That motion was noticed
12 to be heard on December 9, 2018. (AECF No. 10).

13 On December 4, 2018, the instant MRAS was filed by Ross and noticed for hearing on
14 January 9, 2019. (ECF Nos. 89 and 92).

15 On December 5, 2018, Debtor filed an opposition to the Remand Motion. (AECF No.
16 14).

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

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

20 On January 3, 2019, Debtor filed another amended petition that no longer includes the
21 separate attachment specifically identifying CAF Medical and Rutishauser as sole
22 proprietorships. (ECF No. 100).⁷ Attached to the amended petition is an amended Schedule
23

24 ⁷ Whether Rutishauser is a sole proprietorship or a limited liability company, Debtor’s
25 interest in either form is property of the bankruptcy estate. A sole proprietorship is not a
26 fictitious entity that can file its own bankruptcy petition separate from the individual debtor. See
27 Remand Order at 5. More important, when an individual files a Chapter 7 proceeding that
28 includes a membership interest in a limited liability company, the right to manage the limited
liability company passes to the Chapter 7 trustee. See In re B & M Land and Livestock, LLC,
498 B.R. 262, 266-67 (Bankr. D. Nev. 2013) (Beesley, J.). A subsequent bankruptcy filed by the
individual debtor for the limited liability company therefore must be dismissed. Id; see also
Schwartz v. Cleveland (In re Cleveland), 519 B.R. 304, 307 (D. Nev. 2014). The Rutishauser

1 A/B, which does not list any claims or counterclaims against third parties.

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

3 On January 9, 2019, Debtor filed a motion to reconsider the Remand Order
4 (“Reconsideration Motion”). (AECF No. 34). That motion was noticed to be heard on February
5 28, 2019. (AECF No. 35).⁸

6 DISCUSSION

7 Under the Remand Order, the Ross Litigation has been returned to the State Court.
8 Although Debtor has filed his Reconsideration Motion, no request to stay the Remand Order has
9 been requested, nor has a stay been entered. As to non-Debtor parties, removal of the Ross
10 Litigation was over-inclusive because the automatic stay does not prevent Ross from pursuing
11 recovery against any of them. See Remand Order at 8-9. Moreover, the automatic stay also does
12 not prevent the Debtor from being deposed as a percipient witness or from being called to testify
13 at trial. Id.

14 Having succeeded in his remand request, Ross now seeks relief from the automatic stay
15 for cause under Section 362(d)(1) to continue with the Ross Litigation as to the Debtor. See
16 MRAS at 7-8. Ross does not dispute that the Debtor received his discharge on November 14,
17 2018, as to claims that are not encompassed by the Ross Non-Dischargeability Action. The
18 adversary complaint therein asserts that the Debtor’s obligations to Ross are excepted from
19 discharge under three theories: false pretenses, false representations, and/or actual fraud under
20 Section 523(a)(2)(A); fraud or defalcation while acting in a fiduciary capacity, or embezzlement,

21 _____
22 bankruptcy case is assigned to the same bankruptcy judge who issued the B & M Land and
23 Livestock decision.

24 ⁸ At the hearing on the MRAS, counsel for the Debtor represented that the entity
25 Rutishauser was erroneously identified as a sole proprietorship in the prior amended bankruptcy
26 petition because of an error caused by the Debtor’s bankruptcy counsel. Usually, a request for
27 relief based on excusable neglect of counsel is at least supported by counsel’s declaration or
28 affidavit taking responsibility for the error and a request that the client not be prejudiced. See,
e.g., In re Pioneer Inv. Serv. Co., 106 B.R. 510 (Bankr. E.D. Tenn. 1989) (denial of relief based
on excusable neglect of counsel), rev’d and remanded, 943 F.2d 673 (6th Cir. 1991), aff’d,
Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380 (1993). In this instance,
there is no such declaration or affidavit from counsel.

1 or larceny under Section 523(a)(4); and, use of a false statement in writing respecting the
2 Debtor's or an insider's financial condition under Section 523(a)(2)(B).⁹ The elements under all
3 of these theories must be established by a preponderance of the evidence. See Grogan v. Garner,
4 498 U.S. 279, 291 (1991).

5 A nondischargeability claim under Section 523(a)(2)(A) cannot be based on a statement
6 respecting the debtor's or an insider's financial condition. See Lamar, Archer & Cofrin, LLP v.
7 Appling, 138 S.Ct. 1752, 1757 (2018). Instead, the claim must be based on some other culpable
8 conduct establishing: "(1) misrepresentation, fraudulent omission or deceptive conduct by the
9 debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to
10 deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5)
11 damage to the creditor proximately caused by its reliance on the debtor's statement or conduct."
12 Turtle Rock Meadows Homeowners Assoc. v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th
13 Cir. 2000); see also Sachan v. Huh (In re Huh), 506 B.R. 257, 262 (B.A.P. 9th Cir. 2014). Non-
14 disclosure of a material fact constitutes a fraudulent representation where the debtor has a duty to
15 disclose. See Apte v. Japra (In re Apte), 96 F.3d 1319, 1323-24 (9th Cir. 1996). In a business
16 transaction, parties owe each other a duty to disclose if, because of the relationship between
17 them, the customs of the trade, or other objective circumstances, a reasonable expectation of
18 disclosure is created. Id. at 1324. Alternatively, a claim for actual fraud under Section
19 523(a)(2)(A) may be based on proof of an individual debtor's fraudulent scheme, such as a series
20 of fraudulent conveyances, that can be effectuated without a false representation to the creditor.
21 See Husky Int'l Elec., Inc. v. Ritz, 136 S.Ct. 1581 (2016).

22 In contrast, a nondischargeability claim under Section 523(a)(2)(B) must be based on a
23 statement respecting the debtor's or an insider's financial condition that is in writing. Even "a
24 statement about a single asset can be a 'statement respecting the debtor's financial condition.'"
25 Lamar, Archer & Cofrin, LLP, 138 S.Ct. at 1761. In addition, the creditor must demonstrate: (1)
26 that the statement is materially false, (2) that the creditor reasonably relied on the statement, and
27

28 ⁹ The adversary complaint does not allege that the Debtor's obligations to Ross are
nondischargeable as a "willful and malicious injury" encompassed by Section 523(a)(6).

1 (3) that the debtor caused the statement to be made or published with intent to deceive. See 11
2 U.S.C. § 523(a)(2)(B)(i through iv).

3 A nondischargeability claim under Section 523(a)(4) may be based on fraud or
4 defalcation by a fiduciary, or, on a theory of embezzlement or larceny. Fiduciary fraud or
5 defalcation under Section 523(a)(4) requires the creditor to establish that the debtor was acting in
6 a fiduciary capacity pursuant to an express or technical trust rather than a fiduciary
7 characterization arising under nonbankruptcy law. See Lovell v. Stanifer (In re Stanifer), 236
8 B.R. 709, 714 (B.A.P. 9th Cir. 1999). A “defalcation” while acting in a fiduciary capacity
9 requires proof that the debtor acted with “knowledge of, or gross recklessness in respect to, the
10 improper nature of the relevant fiduciary behavior.” Bullock v. BankChampaign, N.A., 569 U.S.
11 267, 269 (2013). Even if the individual debtor is not a fiduciary, a claim for embezzlement is
12 nondischargeable under Section 523(a)(4) upon proof that (1) the debtor rightfully was in
13 possession of property as a non-owner, (2) the debtor appropriated the property for a purpose
14 other than for which the debtor was entrusted, and (3) there are “circumstances indicating fraud.”
15 See Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th
16 Cir. 1991). “When the debtor attempts to conceal the misappropriation or to deceive the creditor
17 regarding the misappropriation, evidence of such concealment or deception can satisfy the
18 ‘circumstances indicating fraud’ element.” McClain v. Crown Coachworks, Inc. (In re
19 McClain), 2017 WL 3298418, at *3 (B.A.P. 9th Cir. Aug. 2, 2017). A claim for larceny also is
20 nondischargeable under Section 523(a)(4) and follows federal common law. See Ormsby v. First
21 Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1205 (9th Cir. 2010). Under federal
22 common law, larceny involves a “[f]elonious taking of another’s personal property with intent
23 to convert it or deprive the owner of the same.” Id., quoting 4 Collier on Bankruptcy ¶
24 523.10[2] (15th ed. rev. 2008). In turn, the term “felonious is defined as ‘proceeding from an
25 evil heart or purpose; malicious; villainous...Wrongful; (of an act) done without excuse or color
26 of right.’” In re Ormsby, 591 F.3d at 1205 n.4.

27 As previously mentioned in notes 4 and 6, supra, the second amended complaint in the
28 Ross Litigation is framed as twelve separate causes of action against various defendants or

1 combinations of defendants, on theories of breach of contract, tortious breach of the implied
2 covenant of good faith and fair dealing, fraudulent misrepresentation, breach of fiduciary duty,
3 conspiracy, embezzlement/theft/conversion, unjust enrichment, preliminary and permanent
4 injunctive relief, accounting, and constructive trust. Debtor is a named defendant with respect to
5 the following causes of action: First (breach of contract), Second (Tortious Breach of Implied
6 Covenant of Good Faith and Fair Dealing), Third (Fraudulent Misrepresentation), Fourth
7 (Breach of Fiduciary Duty), Fifth (Conspiracy), Sixth (Embezzlement/Theft/Conversion),
8 Seventh (Unjust Enrichment), Eighth (Preliminary and Permanent Injunction), Ninth (Aiding and
9 Abetting), and Twelfth (Breach of Contract). Based on the representations made at the hearing,
10 Ross apparently concedes that only the Third (Fraudulent Misrepresentation), Fourth (Breach of
11 Fiduciary Duty), and Sixth (Embezzlement/Theft/Conversion) causes of action are encompassed
12 by the Ross Non-Dischargeability Action. As a result, any obligations of the Debtor predicated
13 on the theories presented by the other causes of action alleged in the Ross Litigation have been
14 discharged.¹⁰ Thus, the remaining question is whether Ross should be permitted to proceed
15 against the Debtor on the theories asserted before the State Court, or, whether Ross should
16 proceed on those theories before the bankruptcy court in the Ross Non-Dischargeability Action.

17 It is well established that issue preclusive effect may be given in dischargeability
18 proceedings to the factual determinations made in a state court action. See Grogan v. Garner,
19 498 U.S. at 284 n.11; see, e.g., In re Ormsby 591 F.3d at 1205 n.3 (state court judgment given
20 issue preclusive effect in action under Section 523(a)(4) and 523(a)(6)); Diamond v. Kolcum (In
21 re Diamond), 285 F.3d 822 (9th Cir. 2002) (state court judgment given preclusive effect in action
22 under Section 523(a)(2) and 523(a)(6)). The issue preclusion rules of the state in which the prior
23 judgment was entered are applied by the bankruptcy court in a subsequent dischargeability
24 proceeding. See Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995);
25 Hebert v. Rakich (In re Hebert), 2016 WL 742175, at *6-9 (B.A.P. 9th Cir. Feb. 23, 2016) (issue
26 preclusive effect under federal rules properly given to prior Michigan bankruptcy court

27 ¹⁰ None of the Debtor's co-defendants in the Ross Litigation have objected to the
28 discharge of any liabilities that the Debtor may have to any co-defendant in connection with that
litigation.

1 dischargeability judgment where participant in litigation filed a subsequent bankruptcy in
2 Nevada). In Nevada, issue preclusion applies to factual determinations in a prior proceeding
3 under the following conditions: (1) the issue decided in the prior litigation must be identical to
4 the issue presented in the current action, (2) the prior ruling must have been on the merits and
5 have become final, (3) the party against whom the judgment is asserted must have been a party
6 or in privity with a party in the prior litigation, and (4) the issue must have been actually and
7 necessarily decided. See Howard v. Sandoval (In re Sandoval), 232 P.3d 422, 423 (Nev. 2010).

8 In this instance, the Ross Litigation has proceeded in the State Court for more than three
9 years and was scheduled for a bench trial to commence in July 2019. Substantial discovery has
10 been completed, including the State Court's resolution of numerous discovery disputes. The
11 standard of proof applied in the Ross Litigation will be no less than the preponderance of
12 evidence standard applicable in the Ross Non-Dischargeability Action. Ross has not consented
13 to this bankruptcy court entering a final judgment with respect to the non-Debtor defendants. As
14 a court of general jurisdiction, the State Court has authority to enter a final judgment with respect
15 to all factual issues and claims asserted in the Ross Litigation. The actual and necessary
16 litigation of any legally identical factual issues may be given preclusive effect by this bankruptcy
17 court without need for re-litigation. Under these circumstances, considerations of judicial
18 efficiency and economy favor allowing the Ross Litigation to be completed to final judgment in
19 the State Court, reserving the determination of dischargeability to the subsequent entry of a
20 judgment in the Ross Non-Dischargeability Action.¹¹ Cause for relief from stay under Section
21 362(d)(1) therefore exists based on the record before this bankruptcy court.¹²

22 ¹¹ Because the Debtor filed a Chapter 7 proceeding, rather than Chapter 13 or Chapter 11,
23 his post-bankruptcy earnings from services performed after the Chapter 7 was filed are not
24 property of the bankruptcy estate. See 11 U.S.C. § 541(a)(6). Compare 11 U.S.C. § 1306(a)(2)
25 [postpetition earnings of individual debtor in Chapter 13 are property of the Chapter 13 estate];
26 11 U.S.C. § 1115(a)(2) [postpetition earnings of individual debtor in Chapter 11 are property of
the Chapter 11 estate]. As a result, those earning are not protected by the automatic stay.

27 ¹² The instant Chapter 7 proceeding was filed, along with the Removal Notice, shortly
28 before an evidentiary hearing was to commence against the Debtor and various non-Debtor
defendants to impose contempt sanctions. See Remand Order at 7-8. A state court proceeding to
enforce a prior order is excepted from the automatic stay as an exercise of the state court's police

1 **IT IS HEREBY ORDERED** that the Motion for Relief from Automatic Stay to Proceed
2 with State Court Action, brought by Douglas B. Ross, M.D., Docket No. 89, be, and the same
3 hereby is, **GRANTED**.

4 **IT IS FURTHER ORDERED** that the automatic stay under 11 U.S.C. § 362(a)(1) is
5 modified as to the action pending in the Eighth Judicial District Court, Clark County, Nevada,
6 styled as Douglas B. Ross, M.D. v. Jairo Rodriguez, PAC, et al., Case No. A-15-728577-B, and
7 that a final judgment may be entered in that action with respect to the above-captioned Chapter 7
8 debtor. The moving party herein shall file a copy of this order in that action.

9 **IT IS FURTHER ORDERED** that the enforcement of any final judgment entered with
10 respect to the above-captioned Chapter 7 debtor shall be subject to a final determination by this
11 bankruptcy court in connection with Douglas B. Ross, M.D. v. Jairo Alejandro Rodriguez,
12 denominated Adversary Proceeding No. 18-01123-MKN.

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14
15 Copies sent via CM/ECF ELECTRONIC FILING

16
17 Copies sent via BNC to:

18 JAIRO ALEJANDRO RODRIGUEZ
19 1182 TWINKLING MEADOWS DRIVE
20 HENDERSON, NV 89012

21 ###
22
23
24
25
26

27 _____
28 power. See Remand Order at 8. Thus, the State Court was and is authorized to proceed in that matter under Section 362(b)(4) regardless of the relief granted by the present order.