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2 JUN - 3 2003

3 BANKRUPTCY COURT
4 OAKLAND, CALIFORNIA

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6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA
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9 In re

No. 98-45385 J

Adv. No. 02-7171

10 CAPTAIN BLYTHERS, INC.,

11 _____ Debtor. _____/

12 TEVIS T. THOMPSON, JR., TRUSTEE,

13 Plaintiff,

14 vs.

15 CAPTAIN BLYTHERS, INC.,
16 Reorganized Debtor,

_____ Defendant. _____/

17 DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

18 This is a declaratory relief action in which plaintiff Tevis T.
19 Thompson, Jr., trustee in bankruptcy, seeks a determination that a
20 certain adversary proceeding now pending in this court is property
21 of the chapter 7 bankruptcy estate. The adversary proceeding in
22 question is Captain Blythers, Inc. v. City of Martinez, A.P. no. 99-
23 4024 AJ (the "Martinez Action"), and was filed January 15, 1999 by
24 the then debtor in possession to recover damages against the City of
25 Martinez (the "City").
26

Decision - Summary Judgment

1 Agreeing that there are no genuine issues of material fact
2 present, the parties have filed cross-motions for summary judgment
3 pursuant to Fed. R. Civ. P. 56, applicable herein via Fed. R. Bankr.
4 P. 7056. The court will grant the trustee's motion and deny the
5 cross-motion by the reorganized debtor.

6 A. Background

7 The material facts are undisputed, and for the most part, are
8 set forth in a set of Stipulated Facts, filed April 30, 2003. For
9 purposes of clarity, the court will briefly summarize them. Prior
10 to the filing of its chapter 11 petition, the debtor owned a
11 restaurant situated on property it leased from the City. After the
12 chapter 11 filing, the debtor filed the complaint in the Martinez
13 Action, alleging various theories under which the debtor sought to
14 hold the City liable for the damages and losses the debtor suffered
15 as the result of the flooding of the parking lot adjacent to the
16 debtor's restaurant. The flooding forced the debtor to suspend all
17 operations at the restaurant.

18 On November 4, 1999, while the Martinez Action remained
19 pending, the court confirmed the debtor's Third Amended Plan of
20 Reorganization (the "Plan"). Thereafter, the reorganized debtor
21 defaulted under the Plan, and the U.S. Trustee moved to convert the
22 case from chapter 11 to chapter 7. The court granted the motion,
23 and entered its order of conversion on June 24, 2002. Subsequently,
24 plaintiff herein was appointed trustee in bankruptcy in the
25 converted chapter 7 case, and the trustee then filed the present
26 adversary proceeding wherein he contends that the Martinez Action is

1 property of the chapter 7 estate. The reorganized debtor, defendant
2 herein, disagrees, and contends that the Martinez Action remains its
3 property, not that of the trustee.¹

4 B. Issue Presented

5 The parties agree that upon the filing of its chapter 11
6 petition, all of the debtor's claims against the City became
7 property of the estate pursuant to Bankruptcy Code § 541(a), and
8 that the Martinez Action, when filed, was therefore property of the
9 estate.

10 The parties further agree that upon confirmation, the Martinez
11 Action reverted in the debtor pursuant to Bankruptcy Code
12 § 1141(b),² which provides: "Except as otherwise provided in the
13 plan or the order confirming the plan, the confirmation of a plan
14 vests all of the property of the estate in the debtor." Here, there
15 were no provisions in the Plan or the order confirming the plan that
16 "otherwise provided," and the Martinez Action thus left the estate
17 upon confirmation.

18 Thus, the precise issue before the court is whether the
19 conversion of the case from chapter 11 to chapter 7 operated under
20 the facts of this case to revert the Martinez Action in the estate.
21

22 ¹The reorganized debtor concedes that it must distribute
23 any litigation recovery to its creditors, but contends that it,
24 and not the trustee, is entitled to control the litigation.

25 ²Except as otherwise stated, all further section references
26 herein are to the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

1 The court holds that the answer is "yes."

2 C. Discussion

3 The Ninth Circuit's decision in In re Consolidated Pioneer
4 Mortgage Entities (Pioneer Liquidating Corp. v. U.S. Trustee), 264
5 F.3d 803 (9th Cir. 2001) is dispositive. In Consolidated Pioneer,
6 as here, the court converted a chapter 11 case to chapter 7 under
7 circumstances where the confirmed plan, as here, did not provide for
8 the estate to continue after confirmation. There, as here, the
9 reorganized debtor argued that conversion would be "technically
10 futile" because nothing would revest in the chapter 7 estate. Id.
11 at 807.

12 The Ninth Circuit rejected this argument holding that § 1141(b)
13 is subject to the provisions of the plan, and that the plan before
14 it contemplated that the property of the liquidating corporation in
15 which the estate's property vested upon confirmation revested in the
16 estate upon conversion of the case to chapter 7. The court
17 reasoned:

18 Despite the fact that the Joint Plan in this case did not
19 specifically provide that remaining assets would revest in
20 the estate in the event of conversion, it (1) contains
21 explicit provisions regarding the distribution of
liquidation proceeds to the investors, the plan's primary
beneficiaries; and (2) gives the bankruptcy court broad
powers to oversee implementation of the plan.

22 Consolidated Pioneer, 264 F.3d at 807.

23 Here, the Plan contains explicit provisions dedicating any
24 proceeds of the Martinez Action to the payment of creditors. In
25 particular, paragraph 9.2 provides:

1 Any claims of in favor of the Debtor and Debtor in
2 Possession, including claims arising under any provision
3 of the Bankruptcy Code, shall be fully reserved and may be
4 enforced by the reorganized debtor for the benefit of
5 creditors in order of priority following confirmation of
6 the plan.

7 Id.

8 This provision is consistent with the debtor's court approved
9 disclosure statement, which the debtor provided to creditors as a
10 condition to its being permitted to solicit acceptances of the plan
11 pursuant to § 1125(b).³ The disclosure statement provided: "Any
12 recovery from the City of Martinez based upon the claims of the
13 debtor against it will be paid to creditors in order of priority."

14 Thus, all of the proceeds of the Martinez Action were dedicated
15 under the Plan to the payment of creditor claims, and the
16 reorganized debtor retained no beneficial interest. It follows that
17 the Plan's "explicit provisions" dedicate the Martinez Action to the
18 payment of creditors, the "primary beneficiaries" (in fact, the only
19 beneficiaries) of the Martinez Action under the Plan.

20 /////
21

22 ³Section 1125(b) provides in relevant part:

23 An acceptance or rejection of a plan may not be
24 solicited after the commencement of the case under this
25 title from a holder of a claim or interest with respect
26 to such claim or interest unless, at the time of or
before such solicitation, there is transmitted to such
holder the plan or a summary of the plan, and a written
disclosure statement approved, after notice and a
hearing by the court as containing adequate
information.

1 Moreover, the bankruptcy court here retained "broad powers"
2 after confirmation, if not over the reorganized debtor's day to day
3 activities, at least over the Martinez Action. The Martinez Action
4 is pending in this court. Paragraph 10.1 of the Plan provides "The
5 bankruptcy court shall retain jurisdiction to construe and enforce
6 the Plan, resolve claims, and other controversies, and enter
7 appropriate orders concerning the bankruptcy case."

8 Thus, this court retained jurisdiction under the Plan to assure
9 that the Martinez Action is prosecuted in good faith for the benefit
10 of the creditors herein, and that all the proceeds of any recovery
11 are paid to creditors.

12 The Consolidated Pioneer decision is consistent with other
13 cases decided by courts in the Ninth Circuit that the Consolidated
14 Pioneer court cited with approval. Consolidated Pioneer, 264 F.3d
15 at 807 n.5. See, e.g., In re Smith, 201 B.R. 267, 273 n.5, (D. Nev.
16 1996), aff'd 141 F.3d 1179 (9th Cir. 1998); In re RJW Lumber Co.,
17 262 B.R. 91, 93 (Bankr. N.D. Cal. 2001). In RJW Lumber, the court
18 observed that § 1112(b)(7) and (8) permit a court to convert a
19 chapter 11 case to chapter 7 in the event the debtor fails to
20 effectuate substantial consummation of a confirmed plan, or
21 materially defaults thereunder, and that "[t]hese provisions make no
22 sense if there is no point to chapter 7 administration." Id. at 93.
23 As the court stated,

24 The far better view, consistent with an integrated
25 interpretation of the Code, is that upon conversion the
26 Chapter 7 estate consists of all remaining assets held for
the benefit of creditors.

1 Id.⁴

2 Indeed, the reorganized debtor here offers no rationale why, in
3 light of the above quoted Plan provisions and § 1122(b)(8),⁵ the
4 Martinez Action must be controlled and administered by the
5 reorganized debtor following conversion, notwithstanding the fact
6 that the reorganized debtor has absolutely no economic stake in the
7 outcome.

8 The reorganized debtor's attempts to distinguish Consolidated
9 Pioneer are not persuasive. The reorganized debtor argues that the
10 liquidating trust in Consolidated Pioneer was a fiduciary for
11 creditors, whereas here, the reorganized debtor is not. Whether
12 true or not, the fiduciary status of a post-confirmation entity is
13 not the point; rather, the point is whether the assets at issue
14 reconstitute upon conversion to chapter 7, which in turn, depends on a
15 construction of the Plan. Section 1141(b); Consolidated Pioneer.

16
17 ⁴The trustee concedes that outside of the Ninth Circuit, the
18 approaches courts have taken with respect to the issue now before
19 this court have not been uniform. See Trustee's Reply to
20 Opposition, filed May 23, 2003, p. 3, n. 1-2.

21 ⁵Section 1129(b)(8) provides
22 Except as provided in subsection (c) of this section,
23 on request of a party in interest or the United States
24 trustee or bankruptcy administrator, and after notice
25 and a hearing, the court may convert a case under this
26 chapter to a case under chapter 7 of this title or may
dismiss a case under this chapter, whichever is in the
best interest of creditors and the estate, for cause,
including . . . (8) material default by the debtor with
respect to a confirmed plan.

1 Here, under that standards articulated in Consolidated Pioneer, the
2 Martinez Action revested in the estate upon conversion.

3 The reorganized debtor correctly notes that on March 24, 2002,
4 after confirmation of the Plan, this court entered an order stating
5 that the assets of the reorganized debtor were not then property of
6 the estate. By that order, the court confirmed that, under the
7 Plan, the reorganized debtor could sell certain assets without court
8 approval. That order, however, had nothing to do with the issue now
9 before the court, which is not whether confirmation of the Plan
10 vested the assets of the estate in the reorganized debtor, but
11 whether the subsequent conversion of the case to chapter 7 revested
12 the assets of the reorganized debtor in the estate.⁶

13 D. Conclusion

14 The court will issue its order granting the trustee's motion
15 for summary judgment, and denying the reorganized debtor's motion
16 for summary judgment. Because no issues remain for decision in this
17 adversary proceeding, the court requests the trustee to submit a

18
19 ⁶Moreover, the estate was not represented in the post-
20 confirmation proceeding in which the order was entered (wherein
21 the reorganized debtor had requested a court order authorizing
22 the sale of certain assets), and in that proceeding, there was no
23 controversy as to, or briefing of, the issues now facing the
24 court. Thus, the order is neither res judicata, Rein v.
25 Providian Financial Corporation, 270 F.3d 895, 899 (9th Cir.
26 2001) (res judicata requires, inter alia, that the parties in the
two proceedings be identical or in privity) nor the "law of the
case" as to such issues. See Pit River Home & Agric. Coop.
Ass'n. v. United States, 30 F.3d 1088, 1097 (9th Cir. 1994)
(application of law of case doctrine is discretionary).

1 proposed judgment on the merits.

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3 Dated: June 3, 2003

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Edward D. Jellen
United States Bankruptcy Judge

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PROOF OF SERVICE

I, the undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Northern District of California at Oakland, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document entitled Decision on Cross-Motions for Summary Judgment by depositing it in the regular United States mail at Oakland, California, on the date shown below, in a sealed envelope bearing sufficient postage, addressed as listed below.

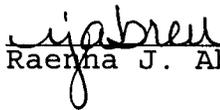
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I declare under penalty of perjury that the foregoing is true and correct.

Dated: JUN - 3 2003


Raenna J. Abreu