

NOT FOR PUBLICATION

1
2 UNITED STATES BANKRUPTCY APPELLATE PANEL
3 OF THE NINTH CIRCUIT
4

5 In re:) BAP No. NC-03-1211-PBK
6 EMANAGE.COM,)
7 Debtor.) Adv. No. 02-7307 AN
8)
9 SYNEX INFORMATION TECHNOLOGIES,)
10 INC.; ROBERT HUANG; C. KEVIN)
11 CHUANG; STEPHEN R. BOWLING,)
12 Appellants,)
13 v.) MEMORANDUM¹
14 ACROPOLIS SYSTEMS, INC.;)
15 TONY YEH; EMANAGE.COM,)
16 Appellees.)

FILED

OCT 29 2003

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

16 Argued and Submitted on
17 September 23, 2003 at San Francisco, California

18 Filed - October 29, 2003

19 Appeal from the United States Bankruptcy Court
20 for the Northern District of California

21 Honorable Randall J. Newsome, Bankruptcy Judge, Presiding
22

23 Before: PERRIS, BRANDT and KLEIN, Bankruptcy Judges.
24
25

26 ¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Appellants, who are defendants in a complaint filed by
2 appellees in California state court, appeal the bankruptcy court's
3 remand of the complaint to state court following appellants' removal
4 to bankruptcy court. We AFFIRM.

5 FACTS

6 Before eManage.com ("debtor") filed a bankruptcy petition, it
7 had sold stock to Tony Yeh, Acropolis Systems, Inc., and Equity
8 Pier, LLC. After the bankruptcy was filed, Acropolis (which had
9 obtained the rights of Equity Pier) and Yeh ("plaintiffs") filed a
10 complaint in California state court against Synnex Information
11 Technologies, Inc. ("Synnex"), Robert Huang, Kevin Chuang and
12 Stephen Bowling ("defendants"), alleging that Synnex, as the
13 majority shareholder of debtor, and Huang, Chuang and Bowling, as
14 officers and directors of debtor and Synnex, were the alter egos of
15 debtor and had violated California securities laws, committed fraud,
16 and breached the contract with regard to the sale of debtor's
17 stock.²

18 Defendants removed the action to the district court, which
19 referred the complaint to the bankruptcy court.³ Defendants claimed
20 that removal was proper because the claims alleged in the complaint
21 are barred by a release contained in a settlement agreement between
22 the bankruptcy trustee and Synnex in a separate lien avoidance
23

24 ² An initial complaint was filed before bankruptcy, but it
25 was never served. The complaint involved in this appeal is the
26 first amended complaint, which was filed and served postpetition.

³ See 28 U.S.C. § 157(a).

1 proceeding, and because the claims belong to the bankruptcy estate,
2 not to plaintiffs.

3 The bankruptcy court granted plaintiffs' motion for remand to
4 state court, and defendants appeal.

5 ISSUES

- 6 1. Whether the Order of Remand is final.
- 7 2. Whether the bankruptcy court abused its discretion in remanding
8 the action to state court.

9 STANDARD OF REVIEW

10 We review a bankruptcy court's decision to remand for abuse of
11 discretion. In re Miles, 294 B.R. 756, 759 (9th Cir. BAP 2003); In
12 re McCarthy, 230 B.R. 414, 416 (9th Cir. BAP 1999). A court
13 necessarily abuses its discretion if it bases its ruling on an
14 erroneous view of the law or on a clearly erroneous finding. Cooter
15 & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

16 DISCUSSION

17 1. Finality

18 The bankruptcy court entered an Order of Remand, in which it
19 set out its findings and reasons for remanding. A judgment is
20 required to be set forth in a separate document. Rule 9021 (making
21 Fed. R. Civ. P. 58 applicable to bankruptcy adversary proceedings
22 and contested matters).⁴ When, as here, the judgment or order is
23 not contained in a separate document, it is deemed entered, and
24 therefore final, 150 days after it is entered in the docket. Fed.

25
26 ⁴ All rule references are to the Federal Rules of Bankruptcy
Procedure, unless otherwise indicated.

1 R. Civ. P. 58(b)(2). See In re Garland, 295 B.R. 347 (9th Cir. BAP
2 2003).

3 In this case, the court's order setting out its findings and
4 conclusions was entered in the docket on April 4, 2003. Therefore,
5 the Order of Remand was deemed entered 150 days after that, or
6 September 1, 2003, and has become final.

7 We may hear appeals of final orders or, with our leave, of
8 interlocutory orders. 28 U.S.C. § 158. An order remanding a claim
9 or cause of action is a final order that we have jurisdiction to
10 review on appeal. See In re McCarthy, 230 B.R. 414 (9th Cir. BAP
11 1999) (reviewing bankruptcy court's remand order); Quackenbush v.
12 Allstate Ins. Co., 517 U.S. 706 (1996) (abstention-based remand order
13 reviewable under collateral order doctrine).

14 2. Remand

15 A. Overview

16 With certain exceptions not relevant here, a party may remove a
17 civil claim or cause of action to district court, if the district
18 court has jurisdiction over the claim or cause of action under 28
19 U.S.C. § 1334. 28 U.S.C. § 1452(a).⁵ After a claim or cause of
20 action has been removed, "[t]he court to which such claim or cause
21

22 ⁵ The procedure for removal is set out in Rule 9027, which
23 requires, among other things, that a notice of removal be filed with
24 the district court clerk. The notice must "contain a short and
25 plain statement of the facts which entitle the party filing the
26 notice to remove, contain a statement that upon removal of the claim
or cause of action the proceeding is core or non-core and, if non-
core, that the party filing the notice does or does not consent to
entry of final orders or judgment by the bankruptcy judge[.]" Rule
9027(a)(1).

1 of action is removed may remand such claim or cause of action on any
2 equitable ground." 28 U.S.C. § 1452(b).

3 If removal is improper because the district court does not have
4 jurisdiction over the claim or cause of action, the matter must be
5 remanded to the court from which it was removed. See In re
6 Michener, 217 B.R. 263, 267 (Bankr. D. Minn. 1998) (bankruptcy court
7 must remand if there is no federal jurisdiction); In re Princess
8 Louise Corp., 77 B.R. 766, 771 (Bankr. C.D. Cal. 1987) (remedy for
9 improper removal is remand). If, however, the court to which the
10 claim or cause of action was removed has jurisdiction, it may
11 nonetheless remand "on any equitable ground." 28 U.S.C. § 1452(b);
12 Michener, 217 B.R. at 267. The "any equitable ground" standard "is
13 an unusually broad grant of authority," which "subsumes and reaches
14 beyond all of the reasons for remand under nonbankruptcy removal
15 statutes." In re McCarthy, 230 B.R. 414, 417 (9th Cir. BAP 1999).

16 B. Jurisdiction

17 The bankruptcy court determined that it had non-core
18 jurisdiction over the removed action. The parties argue at length
19 about whether the bankruptcy court erred in failing to conclude that
20 it had core jurisdiction.

21 Removal is appropriate if the district court has jurisdiction
22 over the claim or cause of action under 28 U.S.C. § 1334. 28 U.S.C.
23 § 1452(a). Section 1334 gives district courts jurisdiction over all
24 proceedings that arise under the Bankruptcy Code or arise in or are
25 related to bankruptcy cases. 28 U.S.C. § 1334(a) and (b). District
26 courts may refer, and each district court has referred, all

1 bankruptcy cases and other matters over which the court has
2 bankruptcy jurisdiction to bankruptcy courts. 28 U.S.C. § 157(a);
3 Princess Louise Corp., 77 B.R. at 768 (all judicial districts have
4 by general order referred bankruptcy matters to bankruptcy courts).

5 Matters over which the bankruptcy court has jurisdiction
6 through referral from the district court are divided into core and
7 non-core proceedings. Bankruptcy judges may hear and determine
8 bankruptcy cases and "core proceedings," which are bankruptcy
9 proceedings arising under the Bankruptcy Code or arising in a
10 bankruptcy case. 28 U.S.C. § 157(b). The bankruptcy court may also
11 determine "non-core proceedings," which are those "related to"
12 bankruptcy cases, but only with the consent of the parties. 28
13 U.S.C. § 157(c)(2). Absent consent, the bankruptcy judge must
14 submit proposed findings and conclusions to the district court,
15 which then enters the final judgment. 28 U.S.C. § 157(c)(1). Thus,
16 the core/non-core distinction does not relate to bankruptcy
17 jurisdiction under 28 U.S.C. § 1334, but instead relates to the
18 authority of the bankruptcy court to enter a final judgment in
19 bankruptcy matters referred to it by the district court.

20 A proceeding may properly be removed to the bankruptcy court so
21 long as the court has jurisdiction, that is, even if it is a non-
22 core proceeding. A properly removed proceeding may be remanded on
23 any equitable ground, regardless of whether the proceeding is core
24 or non-core. Thus, even if, as defendants argue, the court has core
25 jurisdiction, the court may nonetheless for equitable reasons remand
26 to state court a state court action over which the state court has

1 concurrent jurisdiction. In re McCarthy, 230 B.R. 414, 418 (9th
2 Cir. BAP 1999); Michener, 217 B.R. at 267. Because remand is
3 discretionary so long as the court has jurisdiction under § 1334
4 (and defendants do not challenge jurisdiction under § 1334), it is
5 not significant for purposes of remand whether the proceeding is
6 core or non-core. Therefore, we need not review the court's
7 conclusion that the proceeding is non-core. Instead, we will
8 consider the factors relevant to discretionary remand.

9 C. Discretionary remand

10 In considering whether to remand a removed claim or cause of
11 action, the bankruptcy court is to take into consideration various
12 factors, including

13 (1) the effect of the action on the administration of the
14 bankruptcy estate; (2) the extent to which the issues of state
15 law predominate; (3) the difficulty of applicable state law;
16 (4) comity; (5) the relatedness or remoteness of the action to
the bankruptcy case; (6) the existence of a right to a jury
trial; and (7) prejudice to the party involuntarily removed
from state court.

17 Williams v. Shell Oil Co., 169 B.R. 684, 692-93 (S.D. Cal. 1994).

18 Defendants do not argue that the bankruptcy court failed to take
19 these factors into consideration; it expressly did so. Instead,
20 they argue that the court's consideration was flawed and therefore
21 an abuse of discretion.

22 The bankruptcy court said, after setting out the factors from

23 Williams:

24 The Plaintiffs' claims are based solely on state law, and
25 the Superior Court is fully capable of deciding any difficult
26 questions of law that may arise. Although the Defendants have
consented to submit any non-core proceedings to the judgment of
this Court, a review of the pleadings fails to provide any
indication that the Plaintiffs have consented to the same and

1 to waive their right to a jury trial. The state court forum
2 affords the Plaintiffs a jury trial on their causes of action.
3 See, Cal. Const. art. I, §16; Cal. Civ. Proc. Code §592 (right
4 to jury trial for breach of contract action); Raedeke v.
5 Gibraltar Sav. & Loan Ass'n., 10 Cal.3d 665, 671 (1974) (right
6 to jury trial ordinarily exists in suit to recover damages for
7 fraud or breach of contract); Boam v. Trident Financial Corp.,
8 6 Cal.App. 4th 738 (1992) (jury trial held on cause of action
9 for violation of §25401); Stewart v. Ragland, 934 F.2d 1033
10 (9th Cir. 1991) (jury trial held on cause of action for
11 violation of §25110). Accordingly, the availability of a jury
12 trial in the Superior Court supports remand. Moreover, as
13 nothing in the record evidences prejudice to either party if
14 this case were tried in the Superior Court, the interests of
15 judicial economy and comity dictate that this Court defer to
16 the Superior Court.

17 Order of Remand at p. 4:27 - 5:11. In the present case, the court
18 had already, in its discussion of its jurisdiction over the claims
19 in the complaint, determined that the claims were not directly
20 related to the bankruptcy case and would not affect the
21 administration of the estate, except that possible indemnity claims
22 that might exist if plaintiffs are successful in their state court
23 action could conceivably have an effect on the estate. The court
24 noted that the release included in the trustee's settlement
25 agreement, which defendants argue releases them from any liability
26 for these claims, was not relevant to the court's consideration of
the remand motion.

Defendants challenge the court's analysis of each of the
factors.

(a) Effect of action on administration of estate;
relation of claims to bankruptcy case

Defendants argue that the bankruptcy court erred in determining
that the state court claims do not affect the administration of the

1 estate and are not closely related to the bankruptcy case, because
2 (a) the claims belong to the estate and so recovery would increase
3 assets for distribution; (b) the claims concern enforcement of the
4 bankruptcy court order releasing defendants from liability; (c)
5 possible indemnification claims would affect estate administration;
6 and (d) the estate has not been administered.

7 (i) Alter ego claims

8 Defendants rely primarily on In re Folks, 211 B.R. 378 (9th
9 Cir. BAP 1997), for their argument that the claims asserted in the
10 removed state court action belong to the bankruptcy estate and
11 therefore should be decided in the bankruptcy court. In Folks, the
12 issue was whether CBS, Inc. ("CBS") was a creditor of the debtor
13 Folks and so could bring an adversary proceeding objecting to the
14 debtor's discharge under 11 U.S.C. § 727. CBS based its assertion
15 of standing as a creditor on its alter ego claim against Folks for
16 debts of a corporation that Folks controlled, which was also in
17 bankruptcy. The answer to the standing question depended on whether
18 the alter ego claim against Folks was property of the corporation's
19 bankruptcy estate.

20 The panel recognized that whether such a claim belongs to the
21 corporation or to individual creditors is dependent on state law.

22 Under California law,

23 two types of alter ego claims are recognized. The first
24 alleges "'injury to the corporation giving rise to a right of
25 action in it against defendants' and another where 'causes of
26 action belong to each creditor individually.'"

26 211 B.R. at 385 (quoting In re Davey Roofing, Inc., 167 B.R. 604,

1 608 (Bankr. C.D. Cal. 1994), which was quoting Stodd v. Goldberger,
2 73 Cal. App. 3d 827, 833 (1977)).

3 The bankruptcy estate is the proper party to assert an alter
4 ego claim "'if the debtor's claim is a general one, with no
5 particularized injury arising from it, and if the claim could have
6 been brought by any creditor of the debtor.'" Davey Roofing, Inc.,
7 167 B.R. at 608 (quoting Kalb, Voorhis & Co. v. Am. Fin. Corp., 8
8 F.3d 130, 132 (2d Cir. 1993)).

9 Defendants assert that plaintiffs' alter ego claims are estate
10 property, because the trustee could assert them on behalf of the
11 debtor corporation. As plaintiffs point out, defendants ignore the
12 fact that not all alter ego claims are property of the estate, only
13 those that allege generalized injury to the corporation.

14 In this case, plaintiffs allege three claims (violation of
15 California securities laws, fraud, and breach of contract), all
16 related to plaintiffs' purchase of debtor's stock. They seek to
17 recover as damages the amount paid for the stock. Those claims
18 could not be brought by other creditors, because the damage was not
19 general to the corporation, but was specific to plaintiffs.
20 Therefore, the bankruptcy court did not err in determining that the
21 claims are not property of the estate.

22 (ii) Settlement agreement

23 Defendants argue that this action will affect the bankruptcy
24 estate because it concerns enforcement of the settlement agreement
25 entered into by the bankruptcy trustee in the lien avoidance
26 litigation. According to defendants, the bankruptcy court should

1 determine the extent to which the release will be given effect.

2 The bankruptcy court approved a settlement agreement entered
3 into by the bankruptcy trustee, which defendants assert released
4 them from any liability for the state law claims asserted in this
5 complaint.⁶ Although defendants may have an affirmative defense of
6 release, Fed. R. Civ. P. 8(c); Rule 7008, and the enforcement of the
7 settlement agreement entered into by the bankruptcy trustee has some
8 relationship to the bankruptcy case, it does not directly affect the
9 administration of the estate.⁷ The claims in this case are asserted
10 by non-debtors against non-debtors, and are not claims that belong
11 to the bankruptcy estate. The interpretation of the release
12 contained in the settlement agreement does not have any direct
13 impact on the administration of the bankruptcy estate.

14 (iii) Potential indemnification claims

15 Defendants assert that the state law claims are related to the
16 bankruptcy estate, because claims against the estate for
17 indemnification could arise if defendants are found liable for
18 damages arising out of plaintiffs' purchase of debtor's stock.

20 ⁶ The bankruptcy court did not order the release; it merely
21 authorized the trustee to enter into the settlement agreement that
22 contained the release.

23 ⁷ Although the existence of a federal defense to a state law
24 cause of action is not relevant to an analysis of federal removal
25 jurisdiction, Rivet v. Regions Bank of La., 522 U.S. 470
26 (1998) (discussing removal under 28 U.S.C. § 1441, which reasoning is
equally applicable to remand under 28 U.S.C. § 1452(a)), we assume
without deciding for purposes of this decision that a defense based
on a release entered into in a bankruptcy case may be relevant to
the remand factors of whether the state court action is related to
the bankruptcy case or will affect its administration.

1 According to defendants, the possibility of indemnification claims
2 against the estate provides a sufficient connection to the
3 bankruptcy case that the court should have retained jurisdiction
4 rather than remanding to state court.

5 The bankruptcy court was correct that the potential
6 indemnification claims could conceivably affect the bankruptcy
7 estate. Any such claims are contingent and remote.⁸ The bankruptcy
8 court properly took the possibility of such contingent and remote
9 claims into account and did not abuse its discretion in assessing
10 the importance of the potential indemnification claims with regard
11 to removal.

12 (iv) Finding that the estate had been administered

13 Defendants argue that the bankruptcy court was wrong in finding
14 that "the bankruptcy estate has been liquidated and administered[,]"
15 Order of Remand at p. 2:23-24, and that the erroneous finding caused
16 it to reach the wrong conclusion regarding remand. Even if the
17 court erred in finding that the estate had been liquidated and
18 administered, that finding is not fatal to the decision to remand.
19 Because the claims asserted by the non-debtor plaintiffs against the
20 non-debtor defendants do not directly affect the administration of
21 the estate, it is not vital to the remand decision whether the
22 administration of the estate is ongoing or completed.

23
24 ⁸ Plaintiffs argue that there is no relationship to the
25 bankruptcy case, because any indemnification claims would be barred
26 by the automatic stay, and California law does not allow
indemnification for intentional or fraudulent acts. Even aside from
these possible defenses to any indemnification claims, such claims
are contingent and remote.

1 (b) State law issues

2 Defendants acknowledge that the claims asserted in the
3 complaint are state law claims, but argue that the dispositive issue
4 in the case is whether those claims are barred by the release
5 contained in the settlement agreement. They argue that the fact
6 that the claims are based on state law does not mandate remand, and
7 that the decision to remand should not be based solely on the fact
8 that resolution of the issues are affected by state law. Finally,
9 they argue that the state law issues are not difficult and can be
10 determined by the bankruptcy court as well as by the state court.

11 The existence of the release does not require the court to
12 retain jurisdiction over these state law claims. Defendants refuse
13 to recognize that settlement agreements entered into in federal
14 court litigation "are contracts subject to the general rules of
15 contract construction." Nat'l Labor Relations Bd. v. Superior
16 Forwarding, Inc., 762 F.2d 695, 697 (8th Cir. 1985). "The
17 construction and enforcement of settlement agreements are governed
18 by principles of local law which apply to interpretation of
19 contracts generally.'" United Commercial Ins. Serv., Inc. v.
20 Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992) (quoting Jeff D.
21 v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989)). Accord Botefur v.
22 City of Eagle Point, Oregon, 7 F.3d 152 (9th Cir. 1993)
23 (interpretation of agreement settling federal claims is determined
24 under state law). Thus, the settlement agreement in this case will
25 be construed under California state law.

26 It is also apparent that the bankruptcy court did not base its

1 decision to remand solely on the fact that the claims are based on
2 state law. Instead, the court took into consideration various
3 factors in weighing whether to remand.

4 The fact that the state law issues are not difficult does not
5 require the bankruptcy court to retain jurisdiction over the claims.

6 (c) Comity

7 Defendants argue that comity does not require remand, because
8 the release discharged their liability for plaintiffs' claims, and
9 the bankruptcy court is in the best position to interpret and
10 enforce the release. They also note that the complaint was removed
11 from state court promptly, so the state court had not yet expended
12 many resources in managing the case.

13 As we have said, the state court is as capable of interpreting
14 the release provision in the settlement agreement according to state
15 law as is the bankruptcy court. The fact that the state court had
16 not expended resources on administering the case would support the
17 bankruptcy court's retention of the claims, but this factor does not
18 outweigh the other factors or support a conclusion that the
19 bankruptcy court abused its discretion in remanding.

20 (d) Right to jury trial

21 Defendants do not deny that plaintiffs have a right to a jury
22 trial on their claims. They argue that there will never be a trial
23 on the merits for which a jury would be required, because the claims
24 will be dismissed based on the release contained in the settlement
25 agreement. In the alternative, they argue that the bankruptcy or
26 district court could conduct a jury trial on the claims.

1 The right to jury trial weighs in favor of remand. Whether the
2 claims will go to a trial on the merits in light of the release is
3 irrelevant to whether plaintiffs have a jury trial right for these
4 claims. Further, the bankruptcy court can conduct a jury trial only
5 with the consent of the parties. 28 U.S.C. § 157(e); Rule 9015(b).
6 If there were no consent to a jury trial in the bankruptcy court,
7 the proceeding would need to be transferred to the district court
8 for trial, which court would be unfamiliar with the case. Thus, the
9 right to jury trial weighs in favor of returning the claims to state
10 court.

11 (e) Prejudice

12 Finally, defendants argue that refusal to remand would not
13 prejudice plaintiffs but a remand will prejudice defendants, because
14 there is a danger of inconsistent results if the bankruptcy court
15 does not interpret and enforce the release that was part of the
16 settlement of the bankruptcy lien avoidance claim. Because the
17 settlement agreement will be interpreted according to state law, the
18 state court is in as good a position to interpret it as is the
19 bankruptcy court.

20 (f) Conclusion

21 The bankruptcy court weighed the relevant factors and concluded
22 that remand was warranted. Defendants have not demonstrated that
23 the court abused its discretion in remanding the state law claims to
24 state court.

CONCLUSION

The bankruptcy court did not abuse its discretion in remanding to state court. We AFFIRM.

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