

Contract interpretation
Ambiguity
Evidence
Adverse inference rule

Niedermeyer v. Hartvig, BAP No. OR-97-1909
(Bankr. Case No. 393-34767-elp7)

11/13/98

BAP, aff'g ELP

unpublished

The BAP affirmed the bankruptcy court's order sustaining the trustee's objection in part to Niedermeyer's claim. The claim was based on a settlement agreement between Niedermeyer and the trustee, which included a provision that Niedermeyer's claim was deemed allowed in the amount of \$1,329,883.57. Niedermeyer asserted that he was entitled to attorney fees and interest in addition to the allowed claim amount.

The BAP held that state contract law applies to interpretation of a settlement agreement, even if the underlying cause of action is federal. The bankruptcy court did not err in concluding that, under Oregon law, the settlement agreement was ambiguous with regard to whether attorney fees and interest were to be allowed in addition to the amount set out in the agreement. The court did not err in finding, after hearing testimony from Niedermeyer and the trustee's counsel, that the set amount of the allowed claim included attorney fees and interest, and that attorney fees and interest were not allowable in addition to the set amount. The court also did not err in finding that the parties treated the claim as undersecured, so that § 506 did not apply.

The BAP also affirmed the bankruptcy court's allowance of testimony from the trustee's counsel, or in refusing to draw an adverse inference from the trustee's failure to testify.

1 **NOT FOR PUBLICATION**

2 **UNITED STATES BANKRUPTCY APPELLATE PANEL**
3 **OF THE NINTH CIRCUIT**

4
5 In re) BAP No. OR-97-1909-RiJRy
6 NIEDERMEYER-MARTIN COMPANY,)
7 Debtor.)
8 _____)
9 LINUS J. NIEDERMEYER, SR.)
10 Appellant,)
11 v.)
12 DONALD HARTVIG, Trustee,)
13 Appellee.)

Bk. No. 393-34767-elp7

FILED

MEMORANDUM NOV 13 1998

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

14 Argued and Submitted on September 23, 1998
15 at San Diego, California

16 Filed - November 13, 1998

17 Appeal from the United States Bankruptcy Court
18 for the District of Oregon

19 Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

20 Before: RIBLET,² JONES, and RYAN Bankruptcy Judges.

21
22 _____
23 ¹ This disposition is not appropriate for publication and may
24 not be cited to or by the courts of this Circuit except when
25 relevant under the doctrine of law of the case, res judicata, or
26 collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

² Hon. Robin L. Riblet, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 This appeal arises from the bankruptcy court's order
2 sustaining the Trustee's partial objection to Appellant's claim,
3 specifically ruling that the claim shall not include any
4 additional attorney's fees or interest. The panel **AFFIRMS** the
5 decision of the bankruptcy court.

6
7 **I. FACTS**

8 Prepetition, Linus J. Niedermeyer (hereinafter "Appellant")
9 sought dissolution of the Debtor corporation. That litigation
10 was resolved by a written agreement of September 1991, wherein
11 the Debtor agreed to pay Appellant \$1,200,000 for Appellant's
12 stock holdings in the Debtor, with interest, plus additional
13 premiums of \$75,000 and \$136,000. To secure the obligations,
14 Edward Niedermeyer, President of the Debtor, granted a security
15 interest in his Circle Diamond Ranch located in Clackamas
16 County, and the Debtor granted security interests in its
17 corporate headquarters building in Portland, Oregon (sometimes
18 referred to as the Lloyd Center property) and a parcel owned by
19 the Debtor located in Millersberg, Oregon (sometimes referred to
20 as the Linn County property).

21 Subsequent to the filing of the Debtor's bankruptcy
22 petition, the Trustee filed an adversary action to set aside
23 Appellant's alleged security interests in the Debtor's two real
24 properties, alleging the security interests were preferential
25 and/or fraudulent transfers. The Trustee and Appellant settled
26 that action as evidenced by the parties' Settlement Term Sheet

1 and the Trustee's Motion to Approve Settlement, filed January
2 31, 1995.

3 The relevant terms of the Settlement were as follows.
4 Appellant's claim was "deemed allowed in the amount of
5 \$1,329,883.57 and not subject to objection or modification,
6 except the unsecured portion of the claim shall be reduced to
7 the extent of any funds received by [Appellant] under this
8 settlement or otherwise under the Settlement Agreement dated
9 September 18, 1991." The Trustee was to sell the Portland and
10 Millersberg properties, with Appellant having the option to
11 acquire the properties. The sale proceeds of each of the two
12 properties, net costs of sale and valid encumbrances, were to be
13 divided 45 percent to Appellant and 55 percent to the Trustee.
14 Pending sale, net rents from both properties were to be divided
15 in the same proportion. The Trustee retained, free of any claim
16 of Appellant, all rental income received between the petition
17 date and January 1995. In the event that distribution to
18 general unsecured creditors was less than 10 percent (excluding
19 from the calculation the unsecured portion of Appellant's
20 claim), Appellant was to waive his unsecured claim in the
21 estate. Otherwise, Appellant's unsecured claim was to be paid
22 as a general nonpriority unsecured claim. Appellant was to
23 retain his liens and security interests on both properties until
24 sale and distribution of the sale proceeds.

25 Paragraph 6 of the Settlement Term Sheet was the source of
26 the parties' later disagreement. It provided, "Any funds

1 received by [Appellant] under this settlement shall be first
2 applied to pay interest and attorney's fees incurred by
3 [Appellant]."

4 The settlement was noticed to creditors through two
5 separate Notices of Intent to Settle Adversary Proceeding, the
6 first dated November 4, 1994, and the second dated December 23,
7 1994. The bankruptcy court approved the settlement. Appellant
8 received \$43,971 as his share of rents pending the sales,
9 \$280,919 as his share of the net proceeds from the sale of the
10 Linn County property, \$298,230 as his share of the net proceeds
11 from the sale of the Portland property, and \$160,000 from the
12 Clackamas County property.³

13 More than two years after the parties' settlement,
14 Appellant's counsel sent to the Trustee's counsel a statement of
15 account reflecting the agreed-upon claim amount, but adding
16 additional sums for interest and attorney's fees. After
17 application of the sales and rent proceeds received from the
18 Trustee, and other amounts received from the Clackamas County
19 property, Appellant asserted a claim balance of \$1,000,847. It
20 is the interest and attorney's fees portion of this asserted
21 claim to which the Trustee objected. An evidentiary hearing was
22 held on October 20, 1997.

23
24

25 ³ As noted, the Clackamas County property was not owned by the
26 Debtor but was property of Edward Niedermeyer. Thus, these
funds apparently were paid to Appellant outside of the estate.

1 The bankruptcy court sustained the Trustee's partial
2 objection, expressing an understanding that the parties were
3 dealing with an undersecured claim. In interpreting the
4 document, the court started with the basic legal framework
5 provided by the Bankruptcy Code that interest and attorney's
6 fees post-petition are recoverable only to the extent that the
7 creditor has an oversecured claim under § 506.⁴ The court noted
8 that Appellant's testimony as to his understanding of the terms
9 of the settlement was not particularly persuasive because the
10 settlement terms were negotiated between Appellant's counsel and
11 the Trustee's counsel, and neither the Trustee nor his counsel
12 had communicated directly with Appellant. The court further
13 noted that the uncontroverted evidence was that the Trustee's
14 counsel had conversations with Appellant's counsel relative to
15 the meaning of paragraph 6 and had made contemporaneous notes
16 reflecting that the Trustee's counsel was told by Appellant's
17 counsel that paragraph 6 had no bearing on the Trustee. The
18 court found that paragraph 6 did not define the extent to which
19 interest and attorney's fees would be allowable. Thus, the
20 court determined that the ambiguous agreement should be
21 interpreted consistently with the testimony of the Trustee's
22 counsel that paragraph 6 was not intended to contradict the
23 basic Bankruptcy Code structure regarding interest and
24 attorney's fees, but simply dictated how the funds received

25
26 ⁴ Unless otherwise indicated, all references to Chapters and
Sections are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330.

1 would be applied to the claim.

2
3 **II. ISSUES**

4 Two issues are presented on appeal: 1) whether the
5 bankruptcy court made an error in interpreting the parties'
6 written settlement agreement, and 2) whether the bankruptcy
7 court abused its discretion in overruling Appellant's relevancy
8 objection to the testimony of the Trustee's counsel.

9
10 **III. STANDARD OF REVIEW**

11 Where the interpretation of a contract involves review of
12 extrinsic evidence, this court reviews findings of fact for
13 clear error while reviewing de novo the principles of law
14 applied to those facts. In re Tamen, 22 F.3d 199, 203 (9th Cir.
15 1994); Stephens v. City of Vista, 994 F.2d 650, 655 (9th Cir.
16 1993). The bankruptcy court's evidentiary rulings are reviewed
17 for an abuse of discretion. Glover v. BIC Corp., 6 F.3d 1318,
18 1328 (9th Cir. 1993).

19
20 **IV. DISCUSSION**

21 **A. Application of State Law**

22 Appellant argues that the bankruptcy court erred in ruling
23 that the parties' agreement was ambiguous. Appellant also
24 disputes Trustee's argument that Oregon law applies to the
25 construction of the parties' agreement.

1 An agreement to settle a legal dispute is a contract
2 governed by principles of local law which applies to
3 interpretation of contracts generally, even if the underlying
4 cause of action is federal. United Commercial Insurance
5 Service, Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir.),
6 cert. denied, 506 U.S. 1022, 113 S.Ct. 660, 121 L.Ed.2d 585
7 (1992); see also Stephens v. City of Vista, 994 F.2d at 654-55.
8 In this instance, the bankruptcy action was pending in the
9 District of Oregon. The parties' settlement resolved
10 Appellant's claim and Appellant's alleged security interests in
11 two pieces of real property owned by the Debtor, both of which
12 were located in Oregon. Oregon law will apply.

13
14 **B. The Bankruptcy Court did not Err in Finding the Agreement**
15 **Ambiguous**

16 Under general principles of Oregon contract law, contracts
17 are to be construed to effectuate the objectively reasonable
18 intentions of the parties, if possible. Local 3-7,
19 International Woodworkers of Am. v. DAW Forest Prods. Co., 833
20 F.2d 789, 793 (9th Cir. 1987) (citing Van v. Fox, 278 Or. 439,
21 564 P.2d 695, 699 (1977)). The parties' intentions are found in
22 the language of the contract and the surrounding circumstances.
23 U.S. Nat'l Bank of Oregon v. Caldwell, 60 Or.App. 639, 642, 655
24 P.2d 180, 182 (1982), rev. denied, 294 Or. 536, 660 P.2d 682
25 (1983) (citing Spooner v. Polk County, 19 Or.App. 557, 562, 528
26 P.2d 597 (1974)). In determining whether a contract is

1 ambiguous, the court may consider the circumstances under which
2 it was made, including the situation of the subject and of the
3 parties, so that the judge is placed in the position of those
4 whose language she is interpreting. Sunset Coatings Co., Inc.
5 v. Oregon State Dept. of Transportation and Highway Division, 62
6 Or.App.53, 56, 660 P.2d 164, 166 (1983), rev. denied, 294 Or.
7 792, 662 P.2d 728 (1983); P & C Construction Co. v. American
8 Diversified/Wells Park II, 101 Or.App. 51, 56, 789 P.2d 688, 691
9 (1989). Extrinsic evidence is admissible for that purpose
10 without first having to establish the existence of an ambiguity.
11 Deerfield Commodities, Ltd. v. Nerco, Inc., 72 Or.App. 305, 317,
12 696 P.2d 1096, 1105 (1985), rev. denied, 299 Or. 314, 702 P.2d
13 1111 (1985).

14 A contract provision is unambiguous if the language is "so
15 clear as to preclude doubt by a reasonable person." However, if
16 the language is "capable of more than one sensible and
17 reasonable interpretation," it is ambiguous. P & C Constr., 101
18 Or.App. at 55-56 (citing Deerfield Commodities, 72 Or.App. at
19 317 n.7).

20 The bankruptcy court found the parties' agreement to be
21 ambiguous. The bankruptcy court's legal conclusion is reviewed
22 de novo. Tamen, 22 F.3d at 203. This panel starts with a
23 review of the language of the parties' entire settlement
24 agreement. An agreement is to be construed as a whole,
25 employing reasonable methods of interpretation to give effect to
26 every word and phrase. U.S. Nat'l Bank of Oregon, 60 Or.App. at

1 643 (citing New Zealand Ins. v. Griffith Rubber, 270 Or. 71, 75,
2 526 P.2d 567 (1974)). The paragraphs are to be read together to
3 attempt to give a meaning to each that does not defeat the
4 purpose of the others. Id. (citing Cleveland v. Scio School
5 Dist., 30 Or.App. 945, 949, 569 P.2d 35 (1977)).

6 Paragraph 6 of the Settlement Term Sheet provides, "Any
7 funds received by [Appellant] under this settlement shall be
8 first applied to pay interest and attorney's fees incurred by
9 [Appellant]." However, under paragraph 14 of the agreement, the
10 Appellant's claim was fixed in a precise amount, and not subject
11 to objection or modification. Specifically, the claim was
12 "deemed allowed in the amount of \$1,329,883.57 and not subject
13 to objection or modification, except the unsecured portion of
14 the claim shall be reduced to the extent of any funds received
15 by [Appellant] under this settlement or otherwise under the
16 Settlement Agreement dated September 18, 1991." While there is
17 reference to a possible reduction of the claim amount, there is
18 no reference in the agreement to any possible increase in the
19 claim amount. Nowhere in the Settlement Term Sheet is there
20 reference to interest and attorney's fees other than in
21 paragraph 6. The language of the Settlement is not "so clear as
22 to preclude doubt by a reasonable person" as to what the parties
23 intended.

24 Furthermore, the language of the agreement is "capable of
25 more than one sensible and reasonable interpretation." One
26 plausible reading is that taken by the court below, that

1 paragraph 6 was not intended to contradict the basic Bankruptcy
2 Code structure regarding interest and attorney's fees, but
3 simply dictated how the funds would be applied to the claim.
4 Another plausible interpretation is to read paragraph 14 after
5 taking the net amount from paragraph 6, since paragraph 6
6 alludes to some anticipation of a further accounting or
7 calculation of Appellant's claim. This is the interpretation
8 urged by Appellant. Because the language is capable of more
9 than one reasonable interpretation and is not so clear as to
10 preclude doubt, the bankruptcy court correctly found the
11 parties' agreement to be ambiguous.

12
13 **C. The Bankruptcy Court did not Err in Interpreting the**
14 **Agreement**

15 Two witnesses testified at the evidentiary hearing:
16 Appellant and John H. Durkheimer, the Trustee's counsel.
17 Appellant testified that he understood that he was going to
18 receive interest and attorney's fees in addition to the amount
19 agreed upon. Appellant further testified that he never talked
20 to the Trustee or to the Trustee's counsel prior to execution of
21 the agreement, and that his understanding of the agreement came
22 through his own attorney. Appellant's testimony as to such
23 discussions is consistent with that of the Trustee's counsel,
24 Mr. Durkheimer, who testified that his only discussions were
25 with Appellant's counsel and he had no discussions with the
26 Appellant.

1 Mr. Durkheimer testified that paragraph 6 was designed so
2 that any funds received by Appellant would be applied to pay
3 interest and attorney's fees which Appellant incurred, to the
4 extent that interest and attorney's fees were included in the
5 approximate \$1.3 million claim.⁵ Mr. Durkheimer had no
6 understanding of the interest rate that was to be applied and
7 had never asked to look at Appellant's attorney's fees.

8 Mr. Durkheimer further testified that he had conversations
9 with Appellant's counsel regarding the meaning of paragraph 6
10 and had made contemporaneous notes. Those notes indicated that
11 Appellant's attorney told Mr. Durkheimer that paragraph 6 had no
12 bearing on the Trustee. Mr. Durkheimer stated that he did not
13 care how Appellant and his counsel applied the money, and he
14 believed that the wording of paragraph 6 may have been to
15 encourage payment of Appellant's counsel's fees or may have had
16 tax implications. Mr. Durkheimer understood that paragraph 6
17 meant Appellant would be in a position to pay interest and
18 attorney's fees upon receipt of proceeds under the settlement
19 and that he must pay those first. Mr. Durkheimer testified, "If
20 we had intended attorney's fees to be paid, we would have set
21 forth a mechanism by which it could have been done. We would
22 have been explicit. We would have been clear." Mr.
23 Durkheimer's testimony was uncontroverted.

24
25 ⁵ The difference between the claim amount of \$1,329,883.57 and
26 the original \$1,200,000.00 settlement amount may be interest and
attorney's fees referred to in paragraph 6.

1 The Trustee's Motion to Approve Settlement is consistent
2 with Mr. Durkheimer's testimony. In that Motion, the Trustee
3 had argued that even if the Trustee was successful in litigation
4 with Appellant and avoided Appellant's interest in the real
5 property, the Appellant would still have an unsecured claim in
6 the amount of \$1,329,883.57, which amount represented
7 approximately 35 percent of total unsecured claims. Thus, the
8 Trustee explained in his Motion that even if the Trustee was
9 successful in litigation against the Appellant, the Appellant
10 would still be entitled to a dividend of 35 percent, or
11 approximately \$350,000, whereas under the terms of the
12 Settlement, Appellant would receive \$450,000 and the estate
13 would save an estimated \$75,000 in attorney's fees. Nowhere
14 does the Motion raise the possibility of Appellant's claim
15 increasing in amount. The Affidavit of Service attached to the
16 Trustee's Motion reflects that the Motion to Approve Settlement
17 was served on counsel for the Appellant.

18 The record provides no basis for the Trustee in this
19 instance to circumvent the provisions of the Bankruptcy Code.
20 Based upon Mr. Durkheimer's testimony as to paragraph 6 and the
21 consistent representations set forth in the Trustee's Motion to
22 Approve Settlement, there was no clear error in the bankruptcy
23 court's construction of the parties' agreement consistent with
24 Mr. Durkheimer's testimony that paragraph 6 was not intended to
25 contradict the basic Bankruptcy Code structure regarding
26 interest and attorney's fees.

1 The bankruptcy court made an implicit finding that
2 Appellant's claim was undersecured. Appellant argues that he
3 held an oversecured claim and there was never a determination
4 under § 506 to determine the value of his secured claim. To the
5 extent that the bankruptcy court presumed his claim was
6 undersecured, Appellant contends that that presumption was
7 clearly erroneous.

8 Mr. Durkheimer testified that the amount of the secured
9 portion of Appellant's claim was not significant, but the
10 secured portion was treated in paragraph 2 where that claim
11 would be paid 45 percent of the sale proceeds. The balance of
12 Appellant's claim was to be paid as a general nonpriority
13 unsecured claim.

14 In addition to this testimony, the Settlement Term Sheet
15 makes three references to Appellant's "unsecured" claim. The
16 first two references are contained in paragraph 4 which provided
17 that in the event that distribution to general unsecured
18 creditors was less than 10 percent, Appellant was to "waive his
19 unsecured claim in this estate. Otherwise, [Appellant's]
20 unsecured claim shall be paid as a general nonpriority unsecured
21 claim." The third reference is contained in paragraph 14, which
22 fixed the amount of Appellant's allowed claim, and provided that
23 the "unsecured portion of the claim" shall be reduced by the
24 funds received under the settlement.

25 Based on the uncontroverted testimony of the Trustee's
26 counsel and the language of the parties' Settlement, the

1 bankruptcy court's determination that the parties treated the
2 claim as undersecured for purposes of their Settlement agreement
3 was not clearly erroneous.

4 Appellant further argues that the bankruptcy court did not
5 give sufficient probative weight to the fact that a second
6 Notice of Intent to Settle was sent to creditors, allegedly at
7 Appellant's insistence and for the primary purpose of clarifying
8 the payment of interest and attorney's fees to Appellant.

9 Comparison of the two separate Notices of Intent to Settle
10 reveals that numerous substantive changes were made in the
11 Second Notice. In addition to a slight variance in the
12 introductory paragraph describing the claims settled, as well as
13 a change in the hearing date, the second notice reflected the
14 following substantive changes from the first notice:

- 15 • The second notice described the sale as "free and clear of
16 liens;"
- 17 • The second notice added the statement that Appellant was
18 granted an option to purchase the properties;
- 19 • After stating the amount of Appellant's claim, the second
20 notice added the statement that Appellant's claim "shall be
21 deemed allowed in that amount, less [Appellant's] other
22 recoveries under the Agreement described below;"
- 23 • The second notice added an entirely new paragraph stating
24 that the Settlement was conditional upon the Trustee's
25 successfully avoiding the claim or interest of Annamae
26 Niedermeyer in the properties and proceeds thereof;

- 1 • The second notice added an entirely new paragraph stating
2 that the Appellant authorized the Trustee to use up to
3 \$25,000 of cash collateral to pay the premiums on Edward
4 Niedermeyer's life insurance policy; and
- 5 • The second notice added an entirely new paragraph stating,
6 "All funds received by [Appellant] under this settlement
7 shall be first be [sic] applied to pay interest and
8 attorneys fees incurred by [Appellant]."

9 The court allowed Appellant to testify about his
10 understanding of the second notice, but questioned whether
11 Appellant was the proper witness to establish what prompted the
12 second notice to be sent. Appellant testified that the problem
13 with the first notice was it did not clarify the payment of his
14 legal and accounting fees, and that this was remedied by the
15 second notice.

16 Although the bankruptcy court made no specific findings as
17 to the significance of the second notice, the record reflects
18 that in addition to adding language relative to the application
19 of funds to interest and attorneys fees incurred by Appellant, a
20 number of other substantive changes and additions were made to
21 the second notice. This evidence belies Appellant's contentions
22 as to the purpose of the Second Notice. Therefore, we cannot
23 conclude that there was any clear error in the lower court's
24 weighing of the probative value of the evidence presented.

25
26

1 **D. Evidentiary Issues**

2 Appellant maintains that the bankruptcy court erred in
3 admitting and giving weight to the testimony of the Trustee's
4 counsel, because the Trustee's counsel was not a party to the
5 agreement. As noted above, in interpreting the parties'
6 intentions, Oregon state law permits the court to consider the
7 surrounding circumstances under which a contract was made. Both
8 Appellant and the Trustee's counsel testified that the
9 Settlement was negotiated between counsel only. The
10 uncontroverted evidence was that Mr. Durkheimer had specific
11 conversations with Appellant's counsel as to the meaning and
12 purpose of paragraph 6. Mr. Durkheimer's testimony was thus
13 relevant to the interpretation of the ambiguous document. The
14 bankruptcy court did not abuse its discretion in overruling
15 Appellant's objection to the relevancy of Mr. Durkheimer's
16 understanding of the Settlement.

17 Appellant urges application of the adverse inference rule
18 and contends that the Trustee's failure to testify leads to the
19 inference that Trustee's own understanding and intent relative
20 to paragraph 6 was consistent with that of Appellant, and
21 adverse to the testimony of Mr. Durkheimer. The record reflects
22 that the Trustee was present at the hearing. Appellant was at
23 liberty to call the Trustee himself. The decision to draw an
24 adverse inference lies within the sound discretion of the trier
25 of fact. Underwriters Laboratories Inc. v. NLRB, 147 F.3d 1048,
26 1054 (9th Cir. 1998). An adverse inference is not proper where

1 there is no claim of the witness' favorable disposition towards
2 the non-producing party and the witness is equally available to
3 both parties. United States v. St. Michael's Credit Union, 880
4 F.2d 579, 597 (1st Cir. 1989); Underwriters Laboratories, 147
5 F.3d at 1054. In view of the Trustee's presence at the hearing
6 and equal availability, as well as Appellant's failure to raise
7 this issue at the evidentiary hearing, the bankruptcy court did
8 not abuse its discretion in deciding not to draw an adverse
9 inference from the Trustee's failure to testify.

11 V. CONCLUSION

12 The evidence supports the findings and conclusions of the
13 bankruptcy court. There was no clear error in the court's
14 construction of the parties' agreement. The court did not abuse
15 its discretion in allowing the testimony of the Trustee's
16 counsel. Accordingly, this panel **AFFIRMS** the decision of the
17 bankruptcy court.