White Winston Select Asset Funds, LLC, et al. v. Herc Rentals, Inc. 23CV02138
Hearing Date: November 28, 2023
Demurrer to First Amended Cross-Complaint (FACC)

PROPOSED TENTATIVE

The complaint was filed on May 16, 2023, by plaintiff White Winston Select Asset Funds, LLC (hereafter, White or cross-defendant), assignee of Figueroa Mountain Brewing, LLC (hereafter, Figueroa), against defendant Herc Rentals, LLC (hereafter, Herc or cross-complainant), advancing causes of action for breach of contract (first), negligence (second), breach of express warranty (third), breach of implied warranty (fourth), and unjust enrichment (fifth). The complaint involves recovery of damages from Herc for allegedly faulty generator that was provided/installed on May 27, 2020 , causing substantial damage. Herc answered and filed a cross-complaint, culminating in the first amended cross-complaint (hereafter, FACC) against White, for breach of contract (first and second causes of action); express contractual indemnity (really the third cause of action, although Herc describes it as the second); the fourth cause of action for common count (money had and received -- not the third as described by Herc); the fifth "cause of action" for "total equitable indemnity" (not the fourth as described by Herc); and the sixth cause of action for declaratory relief (not the fifth as described by Herc).[1] The allegations in the FACC stem from the acts at issue in the complaint (i.e., involving the supposed faulty generator).

At issue in this matter is cross-defendant White's demurrer to Herc's FACC. White argues initially that all six causes of action fail because Herc, as cross-complainant, has named the wrong party – it should have named Figueroa as the party to the contract. White also contends in a second argument that this court does not have jurisdiction over all six causes of action because Figueroa, the assignor of White's claim, is currently in bankruptcy (after filing a Chapter 11 bankruptcy in federal court), and as there is an automatic stay, Herc cannot pursue its claim, and there is no indication Herc has requested relief by the bankruptcy court from the bankruptcy stay.

The court will address the general demurrer to all six causes of action, and then finish by addressing two additional points raised in the demurrer that will help frame the issues for future purposes.

A) *General Demurrer as to All Six Causes of Action (FACC*)

The complaint, filed by White against defendant Herc, expressly indicates that it is acting as the "assignee of Figueroa []. . . ." The FACC, at issue here, expressly incorporates this allegation into the pleading, even though Figueroa was the party that transacted business with Herc. As a consequence, Herc's FACC essentially claims that as a result of the assignment White stands in the shoes of Figueroa (for both the complaint – an asset – and the FACC – as a liability), even though Figueroa is the party that allegedly breached the rental contract; that Herc is entitled to express contractual indemnity from White if Figueroa is found to have breached the

[1] For clarity, the court will treat the FACC as advancing six causes of action, not five, as claimed by Herc. The court will treat the two breach of contract causes of action separately.

contract, based on this assignment; that there is comparative fault at play as Figueroa was exclusively responsible for damage caused by the generator leased by Herc; and that Herc is asking for declaratory relief as to the Figueroa, whose liability would be attributed to White as Figueroa's assignee.

It seems undisputed from the face of the FACC that Figueroa and White are both corporations, and that White (as an assignee) purchased assets from Figueroa (as the assignor). It has generally been stated that "where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the ***debts and liabilities*** of the former unless (1) the purchaser expressly or impliedly agreed to such assumption, (2) the transactions amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape liability for the debts." (*Franklin v. USX Corp*. (2001) 87 Cal.App.4th 615, 621, emphasis added, citing *Ray v. Alad Corp*. (1977) 19 Cal.3d 22, 28; see *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 822-823; see also *Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1327; *Hernandez v. Enter. Rent-A-Car Co. of San Francisco* (2019) 37 Cal.App.5th 187, 192; T *TROXLER, v. COHNREZNICK LLP,* (C.D. Cal., Apr. 10, 2014, No. CV 13-0948 SS) 2014 WL 12961137, at *3.) Successor liability must be demonstrated on a case-by-case basis. (*Superior Curt Facilities v. Workers Comp. Appeal Bd.* (1994) 27 Cal.App.4th 1015, 1027.) And it seems cross-complainant must plead with some factual specificity the basis for the successor liability in order to survive a pretrial challenge. (*N.A. Sales Company, Inc. v. Seo* (N.D. Cal., Sept. 18, 2019, No. 19-CV-00832-JSC) 2019 WL 4475895, at *10 [conclusory allegations of successor liability under California law – based on a status as simply "successor in interest" – is "itself insufficient to state a claim for successor liability"; the problem with plaintiff's claim is an "over-abundance of detail, but a lack of precision"; motion to dismiss with leave to amend granted, which is the federal equivalent of this state's demurrer process].)

Herc has not pleaded ***any*** basis for White's successor liability under these rules. It has not identified any of the four bases that may establish successor liability as outlined under existing authority, simply assuming (so it appears) that because there was some kind of assignment (vaguely mentioned in White's complaint), White (as a corporate entity) assumed the liabilities of Figueroa (another corporate entity). This allegation alone cannot withstand demurrer. There are no allegations, for example, that White expressly or impliedly assumed the liabilities of Figueroa (as opposed to the assets); no allegations that there was a consolidation or merger of White and Figueroa; no allegations that White, in purchasing the assets, was merely a continuation of the Figueroa corporate entity; and no allegations the transaction was entered into fraudulently or to escape liability. The conclusory allegation that there was an "assignment" – which is the only allegation before the court – is insufficient by itself to satisfy this pleading burden, for it perfunctory, conclusory, and attenuated, made without factual nuance. As there is no basis for successor liability in the FACC as stated, there is no basis for Herc to establish White's liability on the existing complaint as to all six causes of action.

Herc in opposition advances two claims, one procedural and one substantive. Herc contends perfunctorily that the demurrer is untimely pursuant to Code of Civil Procedure section 1005, as defendant's October 12, 2023 filing "does not give proper notice nor allow Herc an

opportunity to respond." The court is not persuaded. Service occurred on October 12, 2023, by email or electronic transmission. And while the original motion was untimely (i.e., because the original hearing date was October 24, 2023, filed less than 16 court days before the hearing), the court continued the matter to November 28, 2023 on its own authority, affording plenty of opportunity for cross-complainant to file supplemental briefing if so desired. Cross-complainant fails to explain why there was any prejudice under these circumstances.

Substantively, Herc claims the court should overrule the demurrer because pursuant to the agreement between Herc and Figueroa, no one but Herc could transfer any right or obligation -- that is, "any attempted assignment of [Figueroa's] purported right to sue Herc is invalid under the contract between Herc and Figueroa . . . ." Cross-complainant goes on as follows: "White's [] demurrer should be overruled because any rights it claims flowing from the Rental Agreement between [Figueroa] and [Figueroa's assignment] is barred by the prohibition on assignments in that Rental Agreement."

These arguments are properly advanced to the allegations ***in the complaint***, not the allegations associated with the FACC. Not to put too fine a point on it (or to state what is seems patently obvious), the FACC was filed by Herc, advancing its claims against Figueroa through White as a possible successor-in-interest. As the reply notes, it appears as though Herc is responding to the allegations in the complaint, not the allegations in the demurrer to the FACC. [2] The court agrees with this assessment, and concludes Herc's arguments offer no basis for the court to deny the demurrer to the FACC.

The court sustains the demurrer as to all six causes of action, with leave to amend, as cross-complainant has failed to plead an adequate basis for successor liability.

B) *Two Additional Arguments Raised by the Demurrer*

The court wishes to address two additional points raised by cross-defendant's demurrer that will help frame the issues in the future.

First, cross-defendant suggests in its demurrer that it "purchased [Figueroa's] legal claims for damages that arise out of Herc's costly mishap with a generator [Figueroa] rented from HERC" "in the [Figueroa] bankruptcy proceeding," citing (*inter alia) Sherwood Partners Inc. v. EOP-Marina Business Center, LLC* (2007) 153 Cal.App.4th 977. This point is repeated and developed in the reply, where cross-defendant states categorically that "nothing in [] the bankruptcy order indicates Figueroa assigned its liabilities to White.

Sherwood explores the contours of a procedure known as "assignment for the benefit of creditors," which is a widely used method by which an insolvent debtor transfers his/her/its

[2] The court offers the following additional observations about cross-complainant's argument. If Herc is correct -- that Figueroa could not assign its rights (and thus its liabilities) to White pursuant to the rental contracts between Herc and Figueroa -- not only would White be unable to sue Herc, but there arguably would be no basis for Herc to sue White as party assignee (the real flavor of what is relevant in the FACC). The court is uncertain whether cross-complainant contemplated the ultimate consequences of its argument on this point.

assets in trust to an assignee, who liquidates them and distributes the proceeds to the creditors. (1 Witkin, Summary of Cal. Law (11th ed. 2023 Supp.), Contracts, § 730; see Code. Civ. Proc., §§ 483.010, 1802; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1025, fn. 1; see also *Bumb v. Bennett* (1958) 51 Cal.2d 294, 299 [because assignments for the benefit of creditors "existed at common law. . . , it follows that" such assignments are not "invalid because they do not conform to the provisions of the Civil Code relating to statutory assignments for the benefits of creditors"].) This device is an alternative to bankruptcy proceedings, and the assignee does not assume the liabilities of the assignor. (*Sherwood Partners, Inc., supra,* at pp. 981-982.)

It is not clear to the court whether White was citing to *Sherwood* and progeny to support the far more general proposition that an assignment does not necessarily include liabilities, or whether in fact the assignment between White and Figueroa was "for the benefit of creditors" as contemplated by these authorities. If cross-defendant cited this case -- and made these arguments -- in the hope of showing that an assignment for benefit of creditors occurred (or that the assignment at no point ever included liabilities), it should plead that in the answer as an affirmative defense. Even if true, as the court has sustained the demurrer, however, with leave to amend, the consequences are clear – cross-complainant must be able to plead *in good faith* a legitimate ground for successor liability under the authority as discussed above, taking into account all documents known or reasonably should be known about the nature of the assignment at issue.[3]

Second, the court wishes to address defendant's alternative claim that this court does not have jurisdiction because of Figueroa's current (and pending) bankruptcy petition. White contends that because Figueroa is currently in bankruptcy (it apparently has filed a Chapter 11 bankruptcy petition in *In re Figueroa Mountain Brewing LLC,* No. 9:20 -bk- 11208 (Bankr. C.D. Cal)); and because those bankruptcy proceedings are ongoing; the automatic stay provisions of title 11 U.S.C. section 362(a) apply – any lawsuit by Herc against White really involves Figueroa, and the matter must be stayed. There is no evidence, concludes White, that Herc has asked the bankruptcy court for relief from the stay. In essence, according to White, even if Herc

[3] This point is reinforced by arguments made in reply. If cross-defendant is correct in reply that cross-complainant was fully aware of the nature and scope of the assignment at issue (i.e., as it was a party creditor to the bankruptcy proceeding involving Figueroa), then cross-complainant will have to account for the nature of the assignment that actually occurred for purposes of any future pleading. Cross-defendant contends categorically in its demurrer (of course without evidence) that the assignment did not include Figueroa's liabilities. If this is true, cross-complainant cannot pretend the document to this effect does not exist when attempting to advance a basis for successor liability. And if cross-defendant is also correct (as it claims to be in reply) that the federal bankruptcy court made an express order about the nature of the assignment at issue (something this court cannot and does not determine because no party has presented the document via a request for judicial notice), the court likely will be bound by it. (See, e.g., *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1163 [a judgment or order, entered in a bankruptcy proceeding, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.].) Again, cross-complainant must account for all documents of which it is aware or should be aware in any future pleadings concerning White's successor liability.

can plead successor liability, the FACC would have to be stayed because the matter essentially involves Figueroa, currently in bankruptcy.

There are a number of problems with defendant's arguments *as advanced in the demurrer*. Initially (but not inconsequentially), cross-defendant has not asked the court to take judicial notice of any documents from the bankruptcy proceeding, and nothing on the face of the FACC suggests the issue can be determined on those allegations. (See, e.g. ,*Panterra GP, Inc. v. Superior Court of Kern County* (2022) 74 Cal.App.5th 697, 710.) Cross-defendant exacerbates the problem by continually citing in reply to documents from the bankruptcy proceeding, (again) without providing a document, a transcript, or a request for judicial notice. A court's function is limited to the testing the legal sufficiency of the complaint, and a demurrer is simply not the appropriate vehicle for determining the truth of disputed facts. (*Ibid*.)

Additionally, and more substantively, cross-defendant overlooks basic principles associated with the meaning and scope of the automatic stay following bankruptcy. It is clear that under state court proceedings in which the bankruptcy debtor is ***plaintiff or cross-complainant***, state court does not lose jurisdiction, time periods are not tolled, and the automatic stay provisions of the Bankruptcy Code are inapplicable. (*Shorr v. Kind* (1991) 1 Cal.App.4th 249, 254-255 [a debtor's cause of action is not tolled by the filing of a bankruptcy petition, a federal authorities hold that a the automatic stay does not apply to actions brought by the debtor]; *Danielson v. ITT Industrial Credit Co.* (1988) 199 Cal.App.3d 645, 652; *In re Miller* (9th Cir. 397 F.3d 726, 729.) This means, of course, the complaint cannot be stayed, as White, while standing in the shoes of Figueroa as plaintiff, can proceed. By contrast, Herc is the cross-complainant in the FACC, and the issue that arises in that context is whether, following an assignment, the bankruptcy stay applies to assignee White (who is not the actual debtor – Figueroa is the actual debtor). (See, e.g., *Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1375 [the automatic stay and, therefore, the discharge injunction apply only to actions brought "against the debtor"; they are "inapplicable to superior court actions *initiated* by the debtor"].)

Neither party has cited authority addressing that situation, which is the one before the court. White cites to *In re Marriage of Sprague & Spiegel-Sprague* (2003) 105 Cal.App.4th 215 and *In re Shamblin* (9th Cir. 1989) 890 F.2d 123, but neither case is apposite. The former simply observed that the automatic stay in bankruptcy is self-executing and is effective upon the filing of a bankruptcy petition, and any action, including any judicial proceeding, taken in violation of the bankruptcy stay is void. (*Id.* at p. 210.) The appellate court did draw a distinction between core bankruptcy proceedings to which the automatic stay would apply (usually involving a substantive right provided by bankruptcy or a proceeding, that by its nature, could arise only in the context of bankruptcy case); and non-core proceedings, which are not integral to the restructuring of the debtor-creditor relations and not do not implicate matters arising under bankruptcy, to which the automatic stay does not apply. (*Id.* at p. 220.) The relationship between an assignor in bankruptcy and an assignee who is not is not discussed at all in the case.

The same is true for *In re Shamblin*, which concluded only that a petition in bankruptcy operates as a stay on any act to create, perfect, or enforce any lien against the property of the bankruptcy estate, and judicial proceedings in violation of this automatic stay are void. (*Shamblin, supra*, 890 F.2d at p. 125.) There was no issue in *Shamblin* concerning the relationship between an assignor and assignee in this context. Cross-complainant's opposition is equally barren of relevant case authority.

The court's own research has been more fruitful. The automatic bankruptcy stay, as a general rule, protects *only* the debtor, the property of the debtor, or property of the estate of the debtor, and does not protect nondebtor parties or their property. (*In re Chugach Forest Products, Inc.* (9th Cir. 1994) 23 F.2d 241, 246.) The narrow exception to this general rule provides that the automatic stay may be extended to nondebtors (such as White) ***only*** where there is such identity between the non-debtor cross-defendant and debtor that a judgment against the former will in effect be a judgment against the latter. (*Ibid*.) That is, such unusual circumstances exist to warrant the extension of the automatic stay to a non-debtor third party when there is such identity between the debtor and the third party that the debtor may be said to be the real party and a judgment or finding against the third party will, in effect, be a judgment or a finding against the debtor. (*McCartney v. Integra Nat. Bank North* (3d Cir.1997) 106 F.3d 506 *In re Resource Energy Technologies, LLC* (Bankr. W.D. Ky. 2009) 419 B.R. 746, 748.) That being said, the automatic stay does not protect separate legal entities, corporations, partnerships or other non-debtor parties in pending litigation. (*In re Lengacher* (Bankr. N.D. Ind. 2012) 485 B.R. 380, 385).) Our own appellate courts have adopted these methodologies. (S*trobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796, 830.) An example of when the bankruptcy stay could apply to a nondebtor is when a suit has been commenced against a third party that is entitled to absolute indemnity from the debtor as a result of any judgment that might be entered against the third party in the nonbankruptcy case. (*Ibid.*; see *In re Aldrich Pump LLC* (Bankr. W.D.N.C., Aug. 23, 2021, No. 20-30608 (JCW)) 2021 WL 3729335, pp. *1, *4, *30–*31 [finding the narrow circumstances described present and issuing a nationwide preliminary injunction that extended an automatic bankruptcy stay to claims against nondebtor insurance companies and other parties holding contractual indemnity rights that could in turn be asserted against chapter 11 petitioners].)

Cross-defendant White has failed to point to anything in the present record to demonstrate that the narrow exception to the general rule (i.e., the automatic stay applies only to the debtor and not nondebtors) is implicated. As noted, for purposes of demurrer, the court is limited to the face of the complaint and any judicially noticed documents. Thus, even if the cross-complainant can plead a successor theory of liability in the next round of pleadings. there is nothing in the record before the court to suggest that the claims against White actually implicate the estate of Figueroa in the bankruptcy matter in any way. ". . . [P]roceedings that do not threaten to deplete the assets of the debtor need not be stayed." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 365, fn. 2, citing *Seiko Epson Corp. v. Nu-Kate International, Inc.* (C.A. Fed.

190 F.3d 1360, 1364-1365.) Claims against White can be disaggregated from Figueroa, meaning they can go forward as advanced under the FACC, particularly as White appears to be a separate legal entity from Figueroa. That is, "unless the assets of the bankrupt estate are at stake, the automatic stay does not extend to actions against parties other than the debtor, . . ." (*United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir.1993); see *Wordtech Systems, Inc. v. Integrated Network Solutions, Inc.* (E.D. Cal., Dec. 5, 2012, No. 2:04-CV-01971-MCE) 2012 WL 6049592, at *2.)

Other authority affirms these principles. "It is clearly established that the automatic stay does not apply to non-bankrupt [parties] even if they are ***in a similar or legal factual nexus with the debtor***." (*Seiko Epson Corp., supra,* 190 F.3d at p. 1364, emphasis added); *Dish Network, LLC. v. Jadoo TV, Inc.* (C.D. Cal., Aug. 14, 2019), No. CV 18-9768-FMO (KSX)) 2019 WL 4544423, at *4 [this principle applies even when the individual co-defendant is closely associated with the bankrupt debtor]; see also *Bradford Technologies, Inc. v. Biggers* (N.D. Cal., May 27, 2014, No. C 11-04621 EDL) 2014 WL 12641953, at *6 [same].) The best White can claim on the present record is that it has a factual or legal nexus with Figueroa based exclusively on the assignment, and nothing more. Nor has there been any showing that unusual circumstances exist, such as where there is an indemnification agreement between the debtor Figueroa and the nondebtor assignee White; or that the proceeding against the nondebtor White would impose a substantial discovery burden on the debtor Figueroa. (*Bradford Technologies, supra,* at p. 6.) Herc's claims against White (including declaratory relief) do not implicate Figueroa's bankruptcy estate.[4]

The court therefore rejects cross-defendant's argument that the automatic say applies to the FACC, or that the automatic stay would apply if cross-complainant can articulate a theory of successor liability, at least on the present record. The court will nevertheless allow White to renew the claim ***if*** it can show sufficient facts of unusual circumstances as detailed above so that the automatic stay could be said to apply to it.

C) Summary

In summary, the court sustains cross-defendant's demurrer to the FACC as to all six causes of action with leave to amend; cross-complainant must allege with specificity the basis for White's successor liability in any future pleading. It must account for all documents at this point when articulating such a theory, including but not limited to the nature of the actual assignment between White and Figueroa (and what it contemplates), if it knows or has reason to know about the contents of the document. The court rejects cross-defendant's contention that the

[4] Of course, if it turns out that Figueroa is the only appropriate party to be sued, and thus must be named as cross-defendant in the FACC, the automatic stay would apply to Figueroa. The court observes without deciding at this point that if both White and Figueroa are appropriate cross-defendants in the FACC, the court may have to determine whether the stay applies to both parties. (See, e.g. *Derringer v. Fitch* (D.N.M., June 8, 2005, No. Civ. 03–149 MV/RLP) 2005 WL 5111008 [all proceedings in a single case are not lumped together for purposes of the automatic stay analysis; within a single case, some actions may be stayed, others not].)

automatic stay applies to the FACC (and specifically to White as a nondebtor) even if Herc can state a basis for successor liability, as there is no evidence of "unusual circumstances" to suggest application of the automatic stay should apply to nondebtor White. The court will nevertheless allow cross-defendant to renew this argument in the future, if appropriate, but only with a more robust and pointed analysis, keeping in mind the principles discussed in this order. Cross-complainant has 30 days from today's hearing to submit a second amended cross-complaint.