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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMESTOWN S'KLALLAM TRIBE,

Appellant,

v.

BEVERLY McFARLAND,

Appellee.

CIV. NO. 2:17-00293-WBS
BANKR. ADV. NO. 16-02090
BANKR. NO. 14-25820-D11

MEMORANDUM AND ORDER RE:
BANKRUPTCY APPEAL

In connection with the Chapter 11 bankruptcy proceeding of International Manufacturing Group, Inc. ("IMG") (Bankr. No. 14-25820), appellee Beverly McFarland ("trustee"), as Chapter 11 Trustee for the estate of IMG, initiated an adversarial proceeding against appellant Jamestown S'Klallam Tribe ("the Tribe") under 11 U.S.C. § 544(b), seeking to avoid and recover the value of certain allegedly fraudulent transfers (Adv. No. 16-02090.) In the bankruptcy court, the Tribe filed a motion to dismiss trustee's First Amended Complaint. Presently before the court is the Tribe's appeal from the bankruptcy court's order denying that motion.

I. Factual and Procedural History

1 On May 6, 2016, appellee brought its adversary
2 proceeding against the Tribe in bankruptcy court under Section
3 544(b) of the Bankruptcy Code (11 U.S.C. § 544(b)). (Excerpts of
4 Records ("ER") at 1, Original Compl. (Docket No. 12-2).)
5 Trustee attempted to serve the complaint on the Tribe's counsel,
6 but there was a typographical error and the complaint was mailed
7 to "James B. Rediger" rather than "Shawn B. Rediger." (ER 109,
8 Certification of Service.) The complaint was ultimately
9 delivered to the correct attorney, and on June 27, 2016, the
10 trustee and Tribe stipulated that the Tribe had been served with
11 the original complaint on May 26, 2016. (ER 746 (Docket No. 17-
12 1).) The Bankruptcy Court entered an order approving this
13 stipulation on June 27, 2016. (ER 749 (Docket No. 17-2).)

14 On August 4, 2016, the Tribe filed a motion to dismiss
15 the trustee's then original Complaint. (ER 111, Tribe's Mot. to
16 Dismiss.) On August 24, 2016, the trustee filed its First
17 Amended Complaint (First Am. Compl. ("FAC") (Docket No. 12-3))
18 and on September 9, 2016, served it on W. Ron Allen, the Tribe's
19 Council Chairman and Chief Executive Officer, and Shawn B.
20 Rediger. (ER 327-31, Certificates of Service.) On September 21,
21 2016, the bankruptcy court denied the Tribe's motion to transfer
22 and motion to dismiss the original Complaint, finding that the
23 First Amended Complaint supersedes the original Complaint and the
24 latter was no longer existent. (ER 373, Mins. of Sept. 21, 2016
25 Hrg. (Docket No. 12-6).)

26 The Tribe then filed another motion to transfer and a
27 motion to dismiss the First Amended Complaint, arguing the
28 original Complaint had not been properly served on the Tribe and

1 the First Amended Complaint was served after the designated 90-
2 day time period had elapsed. (ER 376, Tribe's Mot. to Dismiss
3 Am. Compl.) On November 8, 2016, the bankruptcy court again
4 denied the Tribe's request to transfer venue, denied the Tribe
5 sovereign immunity, and allowed the trustee to pursue a claim
6 under § 544(b). (ER 671-84, Mins. of Nov. 8, 2016 Hrg. (Docket
7 No. 12-7).) The court, though finding that prior service had
8 been sufficient, did not opine as to whether the trustee had
9 shown good cause for her failure to serve the Tribe within 90
10 days from the commencement of the case. Id. at 674. The hearing
11 of the motion was continued to January 23, 2017, to allow the
12 trustee an opportunity to brief the issue related to the timing
13 of service. Id. at 671.

14 On January 26, 2017, the bankruptcy court reaffirmed
15 its denial of the motion to dismiss, finding that service had
16 been proper and that the trustee had shown good cause for her
17 failure to serve the Tribe within the 90-day period. (ER 691-92,
18 Mins. of Jan. 26, 2017 Hrg.)

19 Presently before the court is the Tribe's appeal from
20 the bankruptcy court's order, which argues: (1) the bankruptcy
21 court erred when it found the Trustee could assert a 11 U.S.C. §
22 544(b) claim against the Tribe; (2) the bankruptcy court erred
23 when it found that service had been proper; and (3) the
24 bankruptcy court erred when it extended the time for service.

25 II. Legal Standard

26 In reviewing the bankruptcy court's decision, legal
27 conclusions are reviewed de novo while factual findings are
28 reviewed for clear error. In re Kennerly, 995 F. 2d 145, 146

1 (9th Cir. 1993).

2 III. Discussion

3 A. 11 U.S.C. § 544(b) Claim

4 The Tribe argues the bankruptcy court erred in allowing
5 the appellee to bring a claim to avoid and recover the value of
6 certain allegedly fraudulent transfers under 11 U.S.C. § 544(b)
7 for two reasons: (1) the Tribe is protected from this claim by
8 sovereign immunity and (2) even if sovereign immunity had been
9 abrogated or waived with respect to this claim, the appellee's
10 claim fails because there is no actual unsecured creditor who
11 could avoid the transfers, as required by § 544(b).¹

12 1. Sovereign Immunity

13 11 U.S.C. § 106(a) states "notwithstanding an assertion
14 of sovereign immunity, sovereign immunity is abrogated as to a
15 government unit to the extent set forth in this section with
16 respect to the following: (1) Sections . . . 544. . . ". Thus,
17 government entities may not assert sovereign immunity as a
18 defense to § 544 claims. The Ninth Circuit has held that § 106(a)
19 applies to Indian tribes, thereby abrogating tribal sovereign
20 immunity with respect to § 544. Krystal Energy Co. v. Navajo
21 Nation, 357 F. 3d 1055, 1059 (9th Cir. 2004) ("Because Indian
22 tribes are domestic governments, Congress has abrogated their
23 sovereign immunity in 11 U.S.C. § 106(a).")

24
25 ¹ 11 U.S.C. § 544(b) states that "except as provided in
26 paragraph (2), the trustee may avoid any transfer of an interest
27 of the debtor in property or any obligation incurred by the
28 debtor that is voidable under applicable law by a creditor
holding an unsecured claim that is allowable under section 502 of
this title or that is not allowable only under section 502(e) of
this title.

1 The Tribe argues that Congress has not in fact
2 abrogated its sovereign immunity and contends that Krystal was
3 wrongly decided. The bankruptcy court rejected this argument and
4 followed the Ninth Circuit precedent set by Krystal. The Tribe
5 concedes that while § 106(a) abrogates sovereign immunity with
6 respect to § 544, it applies only to § 544(a) and not to § 544
7 (b). (Tribe's Br. at 18 (Docket No. 12).) The Tribe relies upon
8 the Seventh Circuit's holding in In re Equipment Acquisition
9 Resources, Inc., 742 F. 3d 743, 749 (7th Cir. 2014), which
10 limited §106(a) to §544(a). However, the vast majority of
11 courts, including the bankruptcy court, have not agreed with this
12 interpretation.²

13 There is also no textual basis to support the Tribe's
14 position because the language of § 106(a) does not distinguish
15 between § 544(a) and § 544(b), as the bankruptcy court discussed
16 (see ER 679, Mins. of Nov. 8, 2016 Hrg.) Section 106(a) does not
17 carve out any exceptions for particular subsections, indicating a
18 clear legislative intent to be as broad as possible in abrogating
19 sovereign immunity in the bankruptcy context.

20 Accordingly, because the Tribe has failed to
21 demonstrate that § 106(a)'s reference to § 544 should be limited
22 to § 544(a), the court finds the bankruptcy court was correct in
23 concluding that the Tribe's sovereign immunity has been
24 abrogated. Because the court finds that sovereign immunity has
25 been abrogated, it need not address the additional question of

26 ² The Seventh Circuit itself acknowledged "that by
27 interpreting § 106(a)(1) and § 544(b) as we have, we diverge from
28 all of the bankruptcy and district courts to consider the issue."
Equip. Acquisition, 742 F. 3d at 748.

1 whether the Tribe waived its sovereign immunity.

2 2. Actual Creditor

3 The tribe argues that even if its sovereign immunity
4 has been abrogated, the trustee's § 544(b) claim fails because
5 there is no actual unsecured creditor who could avoid the
6 transfers. The trustee concedes that in order for a trustee to
7 assert a § 544(b) claim, there must be a creditor who could
8 actually avoid the transfer under applicable law outside of
9 bankruptcy. (Appellee Br. at 14, (Docket No. 16).)

10 The Tribe contends there is no such creditor here
11 because any claim brought by an actual unsecured creditor against
12 the Tribe would be barred by sovereign immunity. (Appellant Br.
13 at 6-7.) In In re Equipment Acquisition Resources, Inc., 742 F.
14 3d at 744, the court held that "§ 106(a)(1) does not displace the
15 actual-creditor requirement in § 544(b)(1)." The court went on
16 to state that in §106(a), Congress "did not alter § 544(b)'s
17 substantive requirements merely by stating that the federal
18 government's immunity was abrogated 'with respect to' this
19 provision." Id. at 747.

20 However, the great weight of authority is to the
21 contrary. The Ninth Circuit recently held that "the text of
22 Section 106(a)(1) is unambiguous and clearly abrogates sovereign
23 immunity as to Section 544(b)(1), including the underlying state
24 law cause of action." In re DBSI, Inc., No. 16-35597, 2017 WL
25 3760847, at *6 (9th Cir. Aug. 31, 2017). This explicit
26 abrogation of sovereign immunity means that in order to bring a
27 § 544(b) claim, the trustee need only identify an unsecured
28 creditor who, but for sovereign immunity, could have brought this

1 claim against the Tribe. Accordingly, the court finds the Tribe's
2 argument regarding actual creditor to be meritless.

3 The Tribe also argues that allowing the trustee to
4 bring a § 544(b) claim against the Tribe created a new cause of
5 action in violation of 11 U.S.C. § 106(a)(5), which states that
6 "nothing in this section shall create any substantive claim for
7 relief or cause of action not otherwise existing under this
8 title, the Federal Rules of Bankruptcy Procedure, or
9 nonbankruptcy law." 11 U.S.C. § 106(a)(5). The bankruptcy court
10 rejected this argument, holding that applying §106(a) to §544(b)
11 "does not create a substantive claim for relief that does not
12 otherwise exist; it simply recognizes that, with respect to
13 existing causes of action, sovereign immunity is abrogated." (ER
14 679, Mins. of Nov. 8, 2016 Hrg.) This court, in agreeing with
15 the bankruptcy court's determination, finds that reading
16 § 106(a) in such a way that it abrogates sovereign immunity with
17 respect to §544(b) in no way alters state law or creates a new
18 cause of action. Accordingly, the court agrees with the
19 bankruptcy court's conclusion that appellee may bring a § 544(b)
20 claim against the Tribe.

21 B. Service

22 1. Proper Service

23 The Tribe argues the bankruptcy court erred in refusing
24 to dismiss the First Amended Complaint on the ground that neither
25 it nor the original Complaint was properly served on the Tribe.
26 The Tribe argues that it cannot properly be served by mail and
27 that even if service by mail were sufficient, it never authorized
28 Mr. Allen to accept service of process on its behalf.

1 Bankruptcy Rule 7004(b) allows for nationwide service
2 by mail to all types of persons, business entities, and
3 government entities. Fed. R. Bankr. P. 7004(b).³ When serving
4 the defendant, it is "sufficient if a copy of the summons and
5 complaint is mailed to an agent of such defendant authorized by
6 appointment or by law to receive service of process." Fed. R.
7 Bankr. P. 7004(b)(8). If no one has been specifically designated
8 to accept service, service may be made on state and local
9 governmental entities through mailing "to the chief executive
10 thereof." Fed. R. Bankr. P. 7004(b)(6). The Ninth Circuit has
11 held that service rules are to be "liberally construed to uphold
12 service so long as a party receives sufficient notice of the
13 complaint." Chan v. Soc'y Expeditions, Inc., 39 F. 3d 1398, 1404
14 (9th Cir. 1994).

15 Here, the trustee served her original summons and
16 Complaint on "James B. Rediger" at the law firm of Williams,
17 Kastner & Gibbs, LLC. (ER 109, Certification of Service.) The
18 firm had previously represented the Tribe. However, there is no
19 "James B. Rediger" at the firm, though there is a "Shawn B.
20 Rediger." Despite this typographical error, the summons was
21 routed to the appropriate attorney. (ER 125, Tribe's Mem. of P.
22 & A. at 10.) The trustee later filed the First Amended Complaint,
23 obtained an alias summons, and served both on W. Ron Allen, the
24 Tribe's Council Chairman and Chief Executive Officer. (Tribe's

25
26 ³ The Ninth Circuit has held that Indian tribes are
27 domestic governments, see, e.g., Krystal Energy Co., 357 F. 3d at
28 1059, and thus they are covered by this rule despite the fact
that there is no explicit mention of Indian tribes in the rule
itself.

1 Br. at 22.) By doing so, the trustee clearly complied with the
2 requirements of Rule 7004.

3 The court notes that the stipulation that the Tribe and
4 trustee entered into on June 27, 2016, did not mention any
5 deficiencies in service and expressly stated that "the Trustee
6 served the Complaint on May 26, 2016." (ER 746 (Docket No. 17-
7 1).) On July 15, 2016, the Tribe filed a request that all
8 documents required to be served be sent to its local counsel and
9 its attorneys at Williams Kastner & Gibbs. (ER 751, Req. for
10 Special Notice (Docket No. 22).) It was not until the following
11 month, on August 4, 2016, that the Tribe finally raised the
12 service issues for the first time. (ER 112, Tribe's Mot. to
13 Dismiss.)

14 Here, it is clear that the summons was served by mail
15 and received by both the Tribe's Williams Kastner & Gibbs
16 attorneys and W. Ron Allen. Accordingly, based on the Tribe's
17 conduct, the fact that service by mail is the default mode of
18 service of process in bankruptcy matters, and that the Tribe
19 received actual notice, the court finds that service was
20 effective.

21 2. Timing of Service

22 Rule 4(m) of the Federal Rules of Civil Procedure
23 requires that a complaint be served within 90 days of filing.
24 Rule 4(m) also allows for the time for service to be extended
25 upon either a showing of good cause for the defective service or,
26 if there is no good cause, the court has discretion to dismiss
27 without prejudice or extend the time period. Fed. R. Civ. P.
28 4(m).

1 The Tribe contends the bankruptcy court incorrectly
2 found good cause for the appellee's failure to properly serve the
3 Tribe within the requisite 90-day period and thereby erred in
4 extending the time for service of summons. The Tribe takes the
5 position that there was no service, and thus there could be no
6 "good cause" for an extension of service. However, as discussed
7 above, service was proper.

8 Although the trustee attempted to serve her original
9 complaint on the Tribe within the required 90-day period, thereby
10 complying with Rule 4(m), she did not serve the First Amended
11 Complaint on the Tribe until 126 days after the filing of the
12 original complaint. (ER 327-31, Certificates of Service.) To
13 determine whether appellee has shown good cause for the delay,
14 the court must consider whether "(a) the party to be served. . .
15 received actual notice of the lawsuit; (b) the defendant would
16 suffer no prejudice; and (c) plaintiff would be severely
17 prejudiced if his complaint were dismissed." Oyama c. Sheehan
18 (In re Sheehan), 253 F. 3d 507, 512 (9th Cir. 2001) (citations
19 omitted).


20 Here, it is undisputed that the Tribe had actual notice
21 of the action within the 90-day period. During that time, the
22 Tribe's attorney signed a stipulation in which she agreed to a
23 deadline for the Tribe to respond to the complaint, thus
24 indicating that the Tribe acknowledged it had been served. (ER
25 746.) As for the second requirement, the Tribe does not present
26 any argument indicating that it would suffer any prejudice if the
27 court were to extend the service deadline. Moreover, the trustee
28 would likely suffer severe prejudice if the complaint were

1 dismissed given that she would be barred by the statute of
2 limitations from filing a new complaint against the Tribe. The
3 Ninth Circuit has previously held that "relief under Rule 4(m)
4 may be justified, for example, if the applicable statute of
5 limitations would bar the re-filed action." Lemoge v. United
6 States, 587 F. 3d 1188, 1195 (9th Cir. 2009) (citations omitted).
7 The trustee has therefore demonstrated that all three
8 requirements for a finding of good cause have been satisfied.
9 Accordingly, the court finds the bankruptcy court did not abuse
10 its discretion in extending the time for service under Rule 4(m).

11 Had the trustee been unable to demonstrate good cause,
12 the court still would be entitled to "utilize its broad
13 discretion to extend the time for service."⁴ However, given that
14 the court has found good cause for the extension, the court will
15 not address whether the bankruptcy court could have extended the
16 time for service even absent a finding of good cause.

17 IT IS THEREFORE ORDERED that the bankruptcy court's
18 ruling be, and the same hereby is, AFFIRMED.

19 Dated: September 19, 2017

20 
21 **WILLIAM B. SHUBB**
22 **UNITED STATES DISTRICT JUDGE**

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27 ⁴ United States v. 2,164 Watches, More or Less Bearing a
28 Registered Trademark of Guess?, Inc., 366 F. 3d 767, 772 (9th
Cir. 2004).