

SIGNED.



Dated: June 12, 2008

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

<p>10 In re:</p> <p>11 GRECO-ROMAN, INC.,</p> <p>12 _____ Debtor.</p> <p>13 BANK OF AMERICA, N.A.,</p> <p>14 _____ Plaintiff,</p> <p>15 vs.</p> <p>16 DAVID M. REAVES, Chapter 7 Trustee,</p> <p>17 _____ Defendant.</p> <p>18 DAVID M. REAVES, Chapter 7 Trustee,</p> <p>19 for and on behalf of the estate herein,</p> <p>20 _____ Counterclaimant and Third-Party Plaintiff</p> <p>21 vs.</p> <p>22 BANK OF AMERICA, N.A.,</p> <p>23 _____ Counterdefendant,</p> <p>24 and</p> <p>25 SNAKEBITE LEASING, INC. fka Sellers Petroleum Products, Inc. / GP 26 RESOURCES, INC., dba General Petroleum; and ABC ENTITIES 1-20; ABC ENTITIES 21-40,</p> <p>27 _____ Third-Party Defendants.</p>	<p>) Chapter 7</p> <p>) No. 0-06-bk-00247-JMM</p> <p>) Adv. No. 0-07-ap-00009-JMM</p> <p>) MEMORANDUM DECISION RE:</p> <p>) MOTION TO DISMISS MCA FINANCIAL</p> <p>) GROUP, LTD.</p>
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1 SNAKEBITE LEASING, INC., fka Sellers)
 2 Petroleum Products, Inc., et al.,)
 3 Third-Party Plaintiff)
 4 vs.)
 5 BANK OF AMERICA, N.A., a national)
 6 bank association, and MCA FINANCIAL)
 7 GROUP, LTD.,)
 Third-Party Defendants.)

8 In this adversary proceeding, one of the third-party defendants, MCA Financial Group,
 9 Ltd. ("MCA"), has asked the court to dismiss the third-party complaint filed against it by Snakebite
 10 Leasing, Inc. ("Snakebite") (Dkt. #37).

11 The court heard oral argument thereon on May 23, 2008, has considered the facts,
 12 pleadings, law and argument of the parties, and now rules.

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 14 **MOTION TO DISMISS**

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 16 In ruling on a motion to dismiss for failure to state a claim, under FED. R. CIV. P.
 17 12(b)(6) (incorporated by FED. R. BANKR. P. 7012), a bankruptcy court accepts, as true, all well-
 18 pled allegations and construes the complaint in the light most favorable to the nonmoving party. *In*
 19 *re Magnacom Wireless, LLC*, 503 F.3d 984, 990 (9th Cir. 2007); *In re Valenti*, 310 B.R. 138, 144
 20 (9th Cir. BAP 2004). A motion to dismiss should only be granted if the complaint fails to set forth
 21 "enough facts to state a claim to relief that is plausible on its face." *Weber v. Dept. of Veterans*
 22 *Affairs*, 512 F.3d 1178, 1181 (9th Cir. 2008) (citing, *U.S. v. [redacted]*, 127 S.Ct. 1955, 1974, 167 L.Ed.2d
 23 929 (2007)).

24 If additional facts are set forth beyond those expressed in the complaint, the motion
 25 takes on the attributes of a motion for summary judgment. *See* FED. R. CIV. P. 12(d); FED. R.
 26 BANKR. P. 7056/FED. R. CIV. P. 56. A motion for summary judgment will be granted if, in viewing

1 the evidence in the light most favorable to the nonmoving party, there are no genuine issues of
2 material fact and the movant is entitled to judgment as a matter of law. *Weber*, 512 F.3d at 1181;
3 FED. R. CIV. P. 56(c).

4 5 FACTS

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7 In this case, the operative facts pertinent to the relationship between Snakebite and
8 MCA are not in dispute.

9 1. Prior to the instant involuntary bankruptcy proceeding, the Superior Court of
10 Maricopa County was administering a civil action, cause no. CV2006-010640.

11 2. That state court proceeding involved a variety of assets, alleged to be the
12 property of numerous related entities (the "Entities").¹

13 3. During the course of that state court proceeding, on August 1, 2006, the
14 Superior Court appointed an independent receiver to take charge of, and administer the assets under
15 its jurisdiction.

16 4. MCA was appointed as the state court receiver.

17 5. On September 22, 2006, an involuntary chapter 7 bankruptcy proceeding was
18 filed against Greco-Roman, Inc., the Debtor in this case.

19 6. Three days later, on September 25, 2006, the state court executed an order
20 selling all of the entities' assets, over which it had jurisdiction, to Snakebite. In that order, the
21 Superior Court specifically referenced the pending bankruptcy of Greco-Roman, and stated that to
22 the best information possessed by all parties, and "it appearing that the assets to be sold are not
23 assets of Greco-Roman, Inc.," that MCA, as receiver, was authorized to sell the assets listed in the
24 Asset Purchase Agreement. (Ex. 3 to Dkt. #18 (related to Dkt. #17).)

25 7. Snakebite was, at the time of the entry of the Bankruptcy Court order, aware
26 that Greco-Roman was in an involuntary bankruptcy proceeding.

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28 ¹ Those entities are: Trinity Oil Company, White Dove Group, Greco-Roman, Inc.,
and McNanna, Inc.

1 A state court receiver acts as an arm of the appointing court in a matter over which
2 the state court has jurisdiction. *See Ferguson v. Superior Court*, 76 Ariz. 31, 34, 258 P.2d 421, 432
3 (1953); *S.E.C. v. American Capital Invs., Inc.*, 98 F.3d 1133, 1144 (9th Cir. 1996) (a receiver sells
4 property as the "arm of the court and not as holder of the legal title") (citing 3 CLARK ON RECEIVERS
5 § 920 (3d ed. 1992)); *Int'l Trust Co. v. Decker Bros.*, 152 F. 78, 82 (9th Cir. 1907).

6 As such, acts that are authorized by the court and done in that capacity have quasi-
7 judicial immunity, which is derived from the judge, and do not create personal liability to for the
8 receiver or its surety. *See, e.g., New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1302-03 (9th
9 Cir. 1989) ; *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989) (bankruptcy trustees); *Davis v.*
10 *Bayless*, 70 F.3d 367, 374 (5th Cir. 1995); *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1390
11 (9th Cir. 1987).

12 In contrast,

13 [w]hen a receiver accepts appointment to its office, it undertakes duties
14 to the court and to the estate. These duties are personal and supported by a
15 surety. Derivative judicial immunity does not immunize a receiver for breach
16 of these duties. Normally, a receiver must account personally to its appointing
17 court for the performance of its duties and compliance with the appointing
court's orders. However, to the extent that a receiver has merely performed
actions which the court ordered it to take, a receiver should be immunized
from liability to the estate.

18 *In re Sundance Corp, Inc.*, 149 B.R. 641, 654 (Bankr. E.D. Wash. 1993) (applying similar law).

19 To determine the nature of MCA's actions, as state court receiver, the bankruptcy
20 court must look at the totality of circumstances. *See id.*² Here, MCA, acting only its capacity as
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22 ² The bankruptcy court stated, in *Sundance*:

23 The strength of a receiver's argument for immunity based on compliance
24 with a court's order depends upon the totality of circumstances in which an
25 order is drawn. An order's immunizing power varies with the extent that a
26 court is fully informed as to the nature of the options available for its
27 consideration, and that notice and opportunity is given to interested parties
28 to participate in the decision-making process. *See, Bennett*, 892 F.2d at 823.
An order which is the result of such a process will provide much more
protection than one which is the product of a receiver's mere suggestion. If
the court and the interested parties are fully advised of the risks and options
available to a receiver, given an opportunity to state their views on the
proposed action, and the court's order then adopts the receiver's proposal, it
would be difficult indeed to fault a receiver for following that order. To the

1 receiver, executed the agreement solely in that capacity, passed no warranties to Snakebite, and
2 acted only pursuant to the appointing Superior Court's order.

3 In addition, all of the parties knew about the bankruptcy filing and fully participated
4 in the sale proceeding. The Superior Court specifically referenced the bankruptcy of Greco-Roman
5 and stated, that to the best information possessed by all parties at the time, and "it appearing that the
6 assets to be sold are not assets of Greco-Roman, Inc.," MCA, as receiver, was authorized to sell the
7 assets listed in the Asset Purchase Agreement.

8 It was not then known to MCA, nor was it MCA's responsibility to know, that Greco-
9 Roman's bankruptcy trustee would later take the position that certain Greco-Roman assets had been
10 included in that sale. MCA was not, after disclosing all pertinent information to Snakebite, an
11 insurer of Snakebite's title. Snakebite possessed the same information as MCA, and could have
12 refused to proceed with the sale if it was nervous about the Greco-Roman bankruptcy case. The sale
13 proceeds from the Entities' sale were paid to Bank of America, the Superior Court plaintiff.
14 Snakebite's claim for damages, or for a refund of a portion of its purchase price, is more properly
15 directed to either the bank or the trustee, if any judgment is ever rendered against Snakebite and it
16 is required to return property to the bankruptcy estate.

17 But MCA is not Snakebite's proper target. MCA acted only as the court-appointed
18 receiver for the court. It has no personal liability for carrying out that court's direction,
19 implementing the Superior Court's order and completing the statutory duties imposed upon receivers
20 pursuant to the Arizona Revised Statutes. See ARIZ. REV. STAT. § 12-1241 to 1242.

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24 extent an order is born of such a fully informed process, a receiver may
25 justifiably assert derivative judicial immunity based upon the order. But if a
26 receiver did not analyze the risks inherent in the various known options and
27 bring the risks to the attention of the court and the parties for their
28 consideration in the decision making process, then the court order will not
provide immunity and a receiver will have to defend itself on the merits of
whether it acted with reasonable business judgment.

Sundance Corp., 149 B.R. at 654-55.

1 CONCLUSION

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3 Accordingly, on the undisputed facts before the court, MCA's motion to dismiss, or
4 alternatively its motion for summary judgment shall be granted. MCA's counsel shall lodge a form
5 of partial judgment, dismissing MCA from the instant litigation, including FED. R. CIV. P. 54(b)
6 language, and providing that each party shall bear its own costs and fees.
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8 DATED AND SIGNED ABOVE.

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10 COPIES served as indicated below
11 on the date signed above:

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