



Entered on Docket
February 27, 2006

Hon. Gregg W. Zive
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

Case No. BK-N-99-32815-GWZ

ROBERT R. HAGER,

**MEMORANDUM DECISION RE:
MOTION TO REOPEN
BANKRUPTCY CASE**

Debtor.

A. Introduction

The State of Nevada ex rel., Division of Environmental Protection (“NDEP”) filed its Motion For Reopening Bankruptcy Case No. BK-N-99-32815-GWZ [Robert R. Hager] January 31, 2006. NDEP also filed a Motion for Order Shortening Time in order to hear the Motion to Reopen on an expedited basis. The court set a status hearing to consider the Motion for Order Shortening Time February 7, 2006 at 3:00 p.m. The following appearances were made: William J. Frey on behalf of the movant, NDEP; Donald A. Lattin on behalf of Mactec, formerly Harding ESC, Julia Pierko and Scott Smith; Alan R. Smith, bankruptcy counsel on behalf of the Debtor; Treva J. Hearne, state court litigation counsel on behalf of the Robert Hager Trust; and Lawrence D. Wishart, state court litigation counsel on behalf of Robert R. Hager.

The court took the Motion to Reopen under submission and advised Mr. Lattin to file his joinder by February 10, 2006, and Mr. Smith to file his opposition by February 13, 2006. The court reviewed all the pleadings and exhibits filed in support of and in opposition to the Motion to Reopen, all authority cited therein, and entered

1 an Order Denying Motion To Reopen Bankruptcy Case February 16, 2006. This
2 Memorandum Decision sets forth the court's analysis underlying the Order Denying
3 Motion To Reopen Bankruptcy Case entered February 16, 2006.

4 **B. Procedural History**

5 **1. United States Bankruptcy Court, District of Nevada**

6 The Debtor filed a chapter 11 petition September 9, 1999. The Debtor filed a
7 Motion to Sell Real Property Free and Clear of Liens and Encumbrances (194
8 Glenbrook Inn Rd.) January 25, 2000. A hearing was held February 2, 2000 and on
9 February 10, 2000 the bankruptcy court entered the Order Approving Sale of Real
10 Property Free and Clear of Liens and Encumbrances [194 Glenbrook Inn Rd.,
11 Glenbrook] (the "Glenbrook Sale Order").

12 On December 8, 2000 the Debtor filed a Motion to Sell Real Property Free And
13 Clear Of Liens And Encumbrances (1301 Highway 50)(the "Cave Rock Property").
14 The Debtor proposed to sell the Cave Rock Property to Resort Development
15 Associates, LLC for \$1.4 million payable in cash upon close of escrow. The proposed
16 sale also included a provision whereby Resort Development could retain the Debtor
17 as a consultant for \$50,000. There were two critical conditions in the Debtor's
18 proposed sale: 1) Debtor was to obtain a certification from NDEP that active
19 remediation of the Cave Rock Property had been completed; and 2) the tenants of the
20 general store would be vacated. A hearing was held January 12, 2001. Marlene
21 Ladage and Patrick Taylor (the "Taylors") appeared at the hearing and were
22 represented by Cecelia L. Rosenaur. The Taylors entered a bid for the Cave Rock
23 Property for \$1.4 million without the two conditions required by Resort Development
24 Associates, LLC. The court ordered that the Cave Rock Property be sold to the
25 Taylors. On February 21, 2001 the bankruptcy court entered the Order Approving
26 Sale of Real Property [1301 HWY. 50, Cave Rock, Nevada] to Patrick Taylor (the
27 "Cave Rock Sale Order").

28 The bankruptcy court subsequently entered an order clarifying the Cave Rock

1 Sale Order, but such clarification is of no relevance to the pending Motion to Reopen.

2 On August 24, 2001 and August 28, 2001 the Debtor noticed several Rule 2004
3 examinations in an attempt to discover information related to the remediation of the
4 Cave Rock Property sold by the bankruptcy court by the order entered February 21,
5 2001. The Taylors filed a Motion to Quash Orders of Rule 2004 Examination and for
6 Protective Order on September 7, 2001, and NDEP filed a Motion Quash Order of
7 2004 Examination and/or for Protective Orders on September 12, 2001. The Debtor
8 opposed the motions to quash and argued such examinations were necessary to
9 investigate whether there was collusion between NDEP and Taylor in the purchase of
10 the Cave Rock Property. On October 3, 2001 the court conducted a hearing on the
11 motions to quash. At the hearing the court determined there was not a reasonable
12 basis to permit the 2004 examinations. The court advised the Debtor the Debtor could
13 bring a claim if the Debtor believed there was sufficient basis to do so. The court also
14 ruled that the 2004 examination orders would be quashed without prejudice to the
15 Debtor and that Debtor could seek the same type of relief in the future if the Debtor
16 could show an adequate basis for the examinations

17 Nearly one year later, on June 28, 2002 the Debtor filed a Motion to Approve
18 Compromise to approve the settlement of the litigation between the Debtor and
19 various parties in state and federal court related to the remediation of the Cave Rock
20 Property (the "NDEP Settlement"). No objections to the motion were filed. A
21 hearing was held July 24, 2002, and on August 19, 2002 the bankruptcy court entered
22 the Order Approving Compromise And Settlement [With The] Nevada Department
23 Of Environmental Protection. The court found that the compromise and settlement
24 with NDEP constituted the Debtor's full and complete resolution of any claim by
25 NDEP against the Debtor for clean-up and remediation related to the Cave Rock
26 Property.

27 An Order Dismissing Case was entered September 30, 2002. The dismissal was
28 a result of an Order to Show Cause filed by the Office of the United States Trustee.

1 The order states “It appearing that the Debtor has no further need to reorganize under
2 Chapter 11 . . . and is able to resolve his debts outside of bankruptcy . . . the case is
3 dismissed.” The case was closed January 5, 2004.

4 **2. United States District Court, District of Nevada**

5 While his bankruptcy case was pending, the Debtor filed a complaint in the
6 United States District Court, District of Nevada against Harding ESE, Scott Smith,
7 and Julia Pierko, NDEP and various state officials, alleging violations of his due
8 process and equal protection rights, violations of the RICO Act, and various state-law
9 claims on January 4, 2002. The Debtor dismissed the case as to the state defendants
10 on July 29, 2002 as a result of the NDEP Settlement approved by the bankruptcy
11 court. The District Court granted summary judgment in favor of Harding ESE, Scott
12 Smith, and Julia Pierko on October 2, 2003. The Debtor’s state-law claims were
13 dismissed without prejudice. The Ninth Circuit Court of Appeals affirmed the United
14 States District Court decision granting summary judgment in favor of Harding ESE,
15 Scott Smith, and Julia Pierko on June 30, 2005.

16 **3. Ninth Judicial District Court of the State of Nevada**

17 Prior to the bankruptcy, on December 28, 1998, NDEP filed suit in the Ninth
18 Judicial District Court of the State of Nevada against the Debtor for alleged violations
19 of state environmental statutes and a related administrative order resulting from the
20 removal of underground storage tanks on the Debtor’s Cave Rock Property (the “First
21 State Court Action”). The Debtor hired an environmental consultant firm, Steffen,
22 Robertson & Kirsten, Inc. (“SRK”), to assess and remediate the site. The Debtor
23 executed a deed of trust in favor of SRK on his residence in Glenbrook, Nevada (the
24 “Glenbrook Property”). There was a dispute as to payment and SRK commenced
25 foreclosure on the Glenbrook Property. The Debtor filed his Petition for relief under
26 chapter 11 the day prior to the date set for the foreclosure sale.

27 After the Debtopr’s bankruptcy case was dismissed, on December 9, 2003, the
28 Debtor filed suit against Mactec (aka Harding ESE, Scott Smith, and Julia Pierko) in

1 the Ninth Judicial District Court of the State of Nevada state-law causes of action for
2 fraud, denial of due process under the Nevada Constitution, interference with
3 prospective economic advantage, breach of third party contract, and breach of
4 professional responsibility (the “Second State Court Action”). Mactec filed a third-
5 party complaint against NDEP based on contractual indemnification. The Debtor did
6 not file a claim against NDEP. Mactec and NDEP filed motions for summary
7 judgment which were denied by the State Court.

8 Mactec removed the Second State Court Action to United States District Court,
9 District of Nevada November 11, 2005. NDEP joined the removal. On November 29,
10 2005, the Debtor filed a motion to remand the case back to the State court arguing the
11 removal was untimely, and that the District Court lacked jurisdiction. NDEP and
12 Mactec opposed the remand and argued that the District Court had jurisdiction
13 because the state court proceeding was “an improper collateral attack on a federal
14 court decision.” On January 4, 2006, the District Court entered an Order granting the
15 Debtor’s motion to remand concluding that the federal court lacked subject matter
16 jurisdiction and that “this case does not involve a collateral attack on a federal
17 judgment.”

18 C. Legal Standard

19 “A case may be reopened in the court in which such case was closed to
20 administer assets, to accord relief to the debtor or for other cause.” 11 U.S.C. §
21 350(b). “A case may be reopened on motion of the debtor or other party in interest
22” Fed. R. Bankr. P. 5010.

23 While the Court is considering only the Motion to Reopen at this time, it is
24 necessary to look at the underlying relief NDEP is seeking in its Complaint for
25 Temporary Restraining Order And Permanent Injunction (Motion to Reopen, Ex. A)
26 and Motion for Injunctive Relief Including Temporary Restraining Order And
27 Permanent Injunction (Motion to Reopen, Ex. B) in order to determine if the court
28 should reopen the case.

1 D Discussion

2 In seeking to reopen the bankruptcy case, NDEP and Mactac argue that the
3 Second State Court Action is a collateral attack on the Glenbrook and Cave Rock Sale
4 Orders. In response, Debtor argues that the bankruptcy court lacks subject matter
5 jurisdiction; that NDEP and Mactec lack standing to reopen the bankruptcy case; that
6 NDEP and Mactec are asking the bankruptcy court to sit as an appellate court and
7 review prior orders of the State Court and United States District Court; and, that
8 NDEP and Mactec are acting in bad faith. Upon review of all the pleadings and
9 exhibits filed in support of and in opposition to the Motion to Reopen, all authority
10 cited therein, the court declines to reopen the case.

11 **1. The Debtor did not sue NDEP.**

12 The wrongs complained of by NDEP demonstrate NDEP’s misunderstanding
13 of the facts and the legal standards applicable in this case. NDEP argues that the State
14 Court lacks any authority or jurisdiction to hear or decide a civil case filed by the
15 Debtor against NDEP. However, the Debtor did not file a complaint against NDEP,
16 Mactec did. The Debtor is precluded from filing a complaint against NDEP pursuant
17 to the NDEP Settlement entered into between NDEP and the Debtor in the First State
18 Court Action, and approved by the bankruptcy court August 19, 2002 after notice and
19 a hearing. The Debtor expressly agreed to “forever” discharge the State of Nevada
20 from all actions that arise out of the cleanup of the Cave Rock Property and related
21 litigation. The NDEP Settlement also provides that the Debtor did not forego any
22 claims the Debtor may have against HLA, Harding ESE, Scott Smith and Julia Pierko
23 (now known as Mactec).

24 **2. The Bankruptcy Court is not an appellate court.**

25 NDEP is asking this court to reconsider orders entered by the State Court
26 denying Mactec and NDEP’s motions for summary judgment. The State Court denied
27 Mactec’s Motion for Summary Judgment on its First, Second, and Third Claims for
28 Relief (the only remaining claims) and found “there remains a genuine issue of

1 material fact regarding whether or not the sale of the Cave Rock property in
2 bankruptcy was voluntary.” Mactec argued the Debtor’s claims were barred by the
3 doctrine of res judicata in support of its Motion for Summary Judgment and the State
4 Court denied the Motion for Summary Judgment. Mactec cannot come before this
5 court now and ask this court to determine the res judicata effect of the Cave Rock Sale
6 Order when the State Court has already found a genuine issue of material fact exists.
7 This court will not conduct an appellate review of the State Court’s decisions.

8 **3. The Bankruptcy Court lacks subject matter jurisdiction.**

9 The United States District Court (and thus the bankruptcy court based on
10 referral) has jurisdiction over all proceedings arising under title 11 or arising in or
11 related to cases under title 11. 28 U.S.C. § 1334(b). “An action is related to
12 bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or
13 freedom of action (either positively or negatively) and which in any way impacts upon
14 the handling and administration of the bankruptcy estate.” Fietz v. Great Western
15 Savings, 852 F.2d 455, 457 (9th Cir. 1988)(quoting Pacor, Inc. v. Higgins, 743 F.2d
16 984, 994 (3d Cir. 1984). If “the outcome of the proceeding could conceivably have
17 any effect on the estate being administered in bankruptcy,” then the proceeding falls
18 within the bankruptcy court’s “related to” jurisdiction, id. (quoting Pacor, 743 F.2d
19 at 994); on the other hand, bankruptcy courts have no jurisdiction at all “over
20 proceedings that have no effect on the estate of the debtor.” Celotex Corp. v.
21 Edwards, 514 U.S. 300, 309 n. 6 (1995).

22 The bankruptcy case was dismissed by order entered September 30, 2002
23 because the Debtor had no further need to reorganize under Chapter 11 and was able
24 to resolve his debts outside of bankruptcy. The Declaration of Robert R. Hager also
25 provides that all creditors have been paid in full, or will be paid in full over time.
26 Neither Mactec nor its predecessors’ in interest were creditors of the estate. NDEP
27 withdrew its proof of claim as a condition of the NDEP Settlement with the Debtor.

28 The Debtor is not seeking to set aside the Cave Rock Sale Order. The Debtor

1 has not named Taylor in the Second State Court Action and the Debtor is not
2 challenging Taylor's status as a good faith purchaser pursuant to 11 U.S.C. § 363(m).
3 There has been no appeal of the Cave Rock Sale Order. There was no motion for
4 reconsideration of the Cave Rock Sale Order. The fact that there was no appeal or
5 reconsideration of the Cave Rock Sale Order was discussed at length at the hearing
6 on the motions to quash on October 3, 2001. After the hearing, the Debtor did not file
7 a motion for reconsideration of the Cave Rock Sale Order pursuant to Fed. R. Civ. P.
8 60(b) as incorporated by Fed. R. Bankr. P. 9024(b) even though at the hearing the
9 Debtor suspected a fraud may have occurred. The Cave Rock Sale Order is final.

10 Nor does the Second State Court Action involve the interpretation of the
11 bankruptcy court's Cave Rock Sale Order. The bankruptcy court made its decision
12 based on the facts and evidence made available to the court at the time of the hearing.
13 None of the Debtor's claims against Mactec require an analysis or interpretation of the
14 evidence presented to the court at the hearing on the sale of the Cave Rock Property.
15 A decision by the State Court in the Second State Court Action will have no effect on
16 the administration of the Debtor's estate. Therefore, this court is has no jurisdiction
17 over the matters raised in NDEP and Mactec's pleadings.

18 **4. The applicability of res judicata.**

19 The United States District Court entered an order granting the Debtor's motion
20 to remand and concluded that "this case does not involve a collateral attack on a
21 federal judgment." and the federal court "does not have subject matter jurisdiction."
22 The doctrine of res judicata (claim preclusion) bars relitigation of claims between the
23 same parties if those claims were or could have been litigated. In re Lowenschuss,
24 202 B.R. 305, 310-11 (Bankr. D. Nev. 1996)(internal citations omitted). Res judicata
25 applies when there is: (1) a final judgment on merits; (2) the judgment was rendered
26 by court of competent jurisdiction; (3) the second action involving same parties; and
27 (4) the same cause of action is involved in both cases." In re Kelley, 199 B.R. 698,
28 702 (9th Cir. BAP 1996).

1 The District Court Order is a final judgment on the merits rendered by a court
2 of competent jurisdiction. The time for appeal has passed and neither Mactec nor
3 NDEP appealed the decision. There is no question that the District Court action
4 involves the same parties as this action. Furthermore, the same cause of action is
5 involved in both cases. In the context of the Debtor’s Motion to Remand the parties
6 had ample opportunity to, and did, brief the issue of the District Court’s subject matter
7 jurisdiction and whether or not the Second State Court Action was a collateral attack
8 on the Cave Rock Sale Order. If the District Court does not have subject matter
9 jurisdiction, it necessarily follows that the bankruptcy court does not have subject
10 matter jurisdiction. See Fietz v. Great Western Savings, 852 F.2d 455, 457(9th Cir.
11 1988).

12 The District Court Order analyzes and concludes “this case does not involve a
13 collateral attack on a federal judgment.” and the federal court “does not have subject
14 matter jurisdiction. Mactec and NDEP are barred from re-litigating those issues
15 before this court.

16 E. Conclusion.

17 Based on the foregoing analysis, the court concludes it does not have
18 jurisdiction to hear NDEP’s complaint, and further that NDEP and Mactec are barred
19 from relitigating the issue of the court’s subject matter jurisdiction and whether the
20 Second State Court Action is a collateral attack on the Cave Rock Sale Order.
21 Therefore, the court denies the Motion to Reopen.

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