Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
December 12, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: CHARLESTON ASSOCIATES, LLC, Debtor.	Case No. 13-10499-MKN Chapter 11
CHARLESTON ASSOCIATES, LLC, a Delaware limited liability company, Plaintiff, v. RA SOUTHEAST LAND COMPANY, LLC, a Nevada limited liability company, et al., Defendants.	Adv. Proc. No. 10-01452-MKN Date: December 5, 2017 Time: 1:30 p.m.

ORDER ON PETITION FOR RETURN OF IMPROPERLY GARNISHED PROPERTY[1]

On December 5, 2017, the court heard the Petition for Return of Improperly Garnished Property ("Petition") filed by U.S. Bank National Association, as Trustee, Successor-in-Interest to Bank of America, N.A., as Trustee, Successor by Merger to LaSalle Bank National Association, as Trustee, for the Registered Holders of Bear Stearns Commercial Mortgage

[1] Unless otherwise stated in this Order, all references to "Section" are to the provisions of the Bankruptcy Code ("Code"), 11 U.S.C. §§ 101-1532. All references to "NRS" are to provisions of the Nevada Revised Statutes. All references to "AECF No." are to the numbers assigned to the documents filed in the above-captioned adversary proceeding as they appear on the docket maintained by the clerk of the court.

Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2005-PWR7 ("US Bank").[2] The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On November 15, 2017, US Bank filed the instant Petition (AECF No. 531) seeking an order directing City National Bank ("City Bank") to return funds garnished from an account maintained by New Boca Syndications Group, LLC ("New Boca") at Wells Fargo Bank ("Wells Fargo"). City Bank previously obtained a judgment against New Boca in the above-captioned adversary proceeding. Pursuant to a Writ of Execution served on Wells Fargo, funds held in Account No. 5601 ("Cash Collateral Account") in the amount of $542,343.11 were seized by the Constable for the Las Vegas Township and remitted to City Bank.

In its Petition, US Bank maintains that the funds in the Cash Collateral Account did not belong to New Boca, but had been pledged to US Bank to secure repayment of prior indebtedness. US Bank argues that its interest in the Cash Collateral Account had been perfected under NRS 104.9314(2) by control of the account within the meaning of NRS 104.9104(1)(b). As a result, US Bank asserts that the funds in the Cash Collateral Account were wrongfully garnished by City Bank, and is subject to return to US Bank pursuant to NRS 31.070(1). Moreover, US Bank maintains that it is entitled to recovery of attorney's fees and costs incurred in recovering the funds pursuant to NRS 31.070(2).

City Bank argues that US Bank did not have control over the Cash Collateral Account and therefore did not have a perfected security interest in the account funds. More important, City Bank maintains that it is a transferee of the funds in the Cash Collateral Account within the meaning of NRS 104.9332(b) and therefore takes the funds free of any security interest asserted in the account funds. Finally, City Bank argues that relief under the Petition cannot be granted because of factual issues concerning US Bank's receipt of notice of the garnishment and its

[2] The Petition was heard on an expedited basis pursuant to an order shortening time entered on November 16, 2017. (AECF No. 533). Opposition to the Petition was filed by City Bank on December 1, 2017. (AECF No. 537). A reply was filed by US Bank on December 4, 2017. (AECF No. 538).

asserted control over the Cash Collateral Account.

DISCUSSION

The court having considered the written and oral arguments of the parties, along with the authorities cited, concludes that the Petition must be denied.

There is no dispute that the Cash Collateral Account was opened at Wells Fargo pursuant to the Cash Management Agreement ("CMA")[3] between New Boca,[4] Wells Fargo, and US Bank.[5] The CMA provides that the periodic Rents generated by the subject Property would first be deposited into a drop box account ("Clearing Account")[6] and then periodically swept into the Cash Collateral Account. Both the Cash Collateral Account and the Clearing Account were maintained at Wells Fargo. Both accounts were assigned the federal tax identification number of New Boca, but not US Bank.

The CMA provides for US Bank to have a continuing security interest in the Rents while deposited into both accounts. CMA at § 2(d) and § 7(a). The CMA requires the Cash Collateral Account to be divided into various sub-accounts for, *inter alia*, tax and insurance impounds, and operating expenses. CMA at § 2(e). The CMA imposes a variety of restrictions on the use of the Rents that are deposited into the accounts. CMA at § 3(a). The CMA acknowledges that the purpose of the sub-accounts is "to further secure the performance by [New Boca]" of the underlying loan. CMA at § 2(g). The CMA also requires New Boca to submit an annual budget to US Bank setting forth a budget of monthly operating income, monthly operating capital, and

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[3] A copy of the CMA is attached as Exhibit "1-A" to the declaration of a servicing officer for C-III Asset Management, LLC, that apparently services the underlying US Bank loan to New Boca. The declaration of the servicing officer is attached as Exhibit "1" to the Petition.

[4] The manager of New Boca, International Property Syndications, Ltd., also is a signatory to the CMA.

[5] The recitals to the CMA acknowledge that US Bank is the successor lender to a loan by which New Boca borrowed funds secured by certain real property ("Property") that generates rental proceeds ("Rents").

[6] A copy of a Deposit Account Control Agreement ("DACA") is attached as Exhibit "1-B" to the servicing officer's declaration. That DACA created the Clearing Account that is referenced in the CMA.

monthly operating expenses for the Property. CMA at § 2(h). Budgets for New Boca to maintain the Property were necessary inasmuch as New Boca was required by the CMA to acknowledge that US Bank is not a mortgagee-in-possession. CMA at § 14.

Notwithstanding the establishment of such sub-accounts for New Boca to maintain the Property, the CMA also provides that in the event of default, US Bank would have sole discretion to administer all funds in the Cash Collateral Account. CMA at § 2(i). The CMA also provides that in the event of a default by New Boca, US Bank can demand that Wells Fargo pay to US Bank all funds in the Cash Collateral Account. CMA at § 8(a). It also provides that in the event of a default, New Boca "will have no further right to request or otherwise require [US Bank] to disburse funds from the Clearing Account or the Cash Collateral Account in accordance with the terms of [the CMA] . . ." CMA at § 8(b).

The language of the CMA establishes that US Bank had a security interest in the Rents while both in the Clearing Account and in the Cash Collateral Account. The CMA obligated US Bank to fund the sub-accounts required for New Boca to maintain the Property until an event of default authorized US Bank to otherwise use the Rents. There is no language in the CMA establishing that US Bank had anything more than a security interest in the Rents, nor does any language in the CMA or the DACA provide US Bank with an ownership interest in the funds. Given the language of the CMA, US Bank's assertion that it had legal ownership of funds in going through two different deposit accounts bearing the tax identification number of an unaffiliated entity raises serious questions, none of which militate in favor of the Petition.[7] No suggestion is made that either deposit account contained funds other than Rents, nor that either deposit account contained funds claimed by other parties.

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[7] Neither the Cash Collateral Account nor the Clearing Account was a joint account shared by New Boca and US Bank, or shared by New Boca and any other party. Compare Bank of America Leasing & Capital, LLC v. Sferas Incorporated, 2011 WL 1744943 (2nd Dist. Cal. May 9, 2011)(reversal of judgment creditor's levy on joint bank account in which judgment debtor did not have any funds). As previously discussed, the parties made certain in the CMA that only New Boca's tax identification number would appear on the Cash Collateral Account and the Clearing Account. Instead of expressly stating that US Bank individually or jointly owned the funds in either account, the CMA did nothing more than preserve US Bank's security interest in the Rents upon their deposit into both accounts.

City Bank argues that the Cash Collateral Account garnished pursuant to the Writ of Execution was a deposit account that is subject to Section 9-332 of the Uniform Commercial Code ("UCC"). The UCC was adopted by the State of Nevada and is set forth in Chapter 104 of the Nevada Revised Statutes. NRS 104.9332 provides, in full, as follows:

> 1. A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.
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> 2. A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(Emphasis added). There is no dispute that the Clearing Account was a deposit account limited to the Rents collected on the Property. There is no dispute that the Cash Collateral Account also was a deposit account limited to the funds transferred from the Clearing Account. There is no dispute that the purpose of the CMA was to preserve and continue US Bank's security interest in the Rents collected from the Property.

There also is no dispute that City Bank was not a party to the CMA nor the DACA that created the Clearing Account. As a result of the Writ of Execution, the funds in the Cash Collateral Account were garnished by the Constable for the Las Vegas Township and provided to City Bank. There is no dispute that the Writ of Execution was the result of a Judgment in Favor of City National Bank entered on July 18, 2017, in the above-captioned adversary proceeding. There is no dispute that a stay of the Judgment was never requested nor entered.

In Stierwalt v. Associated Third Party Administrators, 2016 WL 2996936 (N.D. Cal. May 25, 2016), the federal district court examined whether the California version of UCC 9-332 applied to a judgment creditor who obtains funds from a deposit account through a writ of execution. The language of the California version is identical to the language in NRS 104.9332.[8]

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[8] The California version provides as follows:

> (a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.
>
> (b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the

The Stierwalt court concluded that the judgment creditor was a transferee within the meaning of UCC 9-332(2) and took the garnished funds free of a lender's security interest in the judgment debtor's deposit accounts.

The Stierwalt court was persuaded by the California appellate court's decision in Orix Financial Services, Inc. v. Kovacs, 167 Cal.App.4th 242 (1st Dist. Cal. 2008). In Orix, the plaintiff had obtained a security interest in the inventory, accounts receivable, and deposit accounts of a business entity. The proceeds of the inventory and accounts receivable were held in the deposit accounts. A separate creditor obtained a judgment against the business entity and executed upon the deposit accounts. The plaintiff's suit against the separate creditor for unjust enrichment was dismissed by the trial court and the California appellate court affirmed. Both courts reached the same conclusion that a judgment creditor who garnishes a deposit account is a transferee protected by UCC 9-332(2). Among other things, the Orix court addressed the plaintiff's argument that a judgment creditor was not intended to be the type of transferee protected by the statute. The appellate court disagreed, observing that:

> The broad language of the statute does not support Orix's contention. The drafters of the revised UCC, as well as our Legislature, had the opportunity to include the exception suggested by Orix in the language of the revised codes - the issue was certainly presented by the history of litigation on the subject. They did not do so; we will not do so in the first instance.

167 Cal.App.4th at 250.

But the Orix court went further in its discussion of the breadth of the language in UCC 9-332:

> We note that the lion's share of transferees from a deposit account are creditors of one form or another - secured, unsecured, judgment, etc. For instance, a landlord and a utility company are creditors and are, ordinarily, unsecured. They would not be excepted from the protections of section 9-332(b). Thus, any suggestion that the rights of a secured creditor cannot be compromised by junior creditors is not persuasive. Indeed, as the comment to section 9-332 quoted[9] above makes

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> debtor in violating the rights of the secured party.

Cal.Comm.Code § 9332 (emphasis added).

[9] The Orix court included a lengthy quotation from the UCC comments. Comment 3 states the policy behind the section, in pertinent part, as follows: "Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow

> clear, a protected transferee need not be a creditor at all, but may have been paid by mistake or otherwise have provided no value to debtor in exchange for the payment.

Id. at 250 (emphasis added). In the instant case, both US Bank and City Bank are creditors of New Boca, and under the analysis in both Stierwalt and Orix, City Bank also would be a protected transferee.

At oral argument, US Bank attempted to distinguish Orix (and therefore Stierwalt) by its reference to the policy behind UCC 9-332 of facilitating the "free flow of funds." See UCC Comment 3 set forth in note 9, supra. US Bank maintained that the funds in the Cash Collateral Account are not "free flowing" because they are subject to the restrictive conditions set forth in the CMA. As a result, US Bank argued that the rationale behind UCC 9-332 does not apply to deposit accounts such as the Cash Collateral Account.

The problem with US Bank's position is that it would apply to every deposit account that is the subject of a loan transaction that includes a provision creating a security interest in the borrower's assets. Likewise, it would be true of every deposit account that constitutes "cash collateral" within the meaning of Section 363(a) of the Bankruptcy Code. The express language of UCC 9-332(b) allows a transferee of funds from any deposit account to take the funds free of security interests. Jurisdictions that adopted the UCC easily could have included language excepting deposit accounts created for receipt of specific funds and for use for specific purposes, but US Bank offers no examples of any jurisdiction that has done so. Moreover, US Bank does not even suggest that the Nevada Legislature has considered revisions to the language of UCC 9-332.

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of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person 'who in good faith changed position in reliance on the payment." 167 Cal.App.4th at 246-47. (Emphasis added.)

The more recent decision of In re Delano Retail Partners, 2017 WL 3500391 (Bankr. E.D. Cal. Aug. 14, 2017), illustrates the application of UCC 9-332 in a bankruptcy context. In that case, a Chapter 7 debtor originally held funds in a bank account that were transferred to its attorney's trust account before the bankruptcy petition was filed. Thereafter, the funds were transferred to the Chapter 7 trustee. A creditor that originally was given a security interest in the debtor's deposit accounts asserted that the security interest continued in the funds transferred to the trustee. The creditor attempted to distinguish Orix and Stierwalt by asserting that the Chapter 7 trustee was not a judgment creditor who obtained funds from a deposit account and therefore was not a transferee within the meaning of UCC 9-332. Id. at *8-9. The bankruptcy court concluded, however, that the Chapter 7 trustee had the status of hypothetical judgment creditor and lienholder as of the bankruptcy petition date under Section 544(a) of the Code. As a result, the Chapter 7 trustee also was a transferee under UCC 9-332, consistent with both Orix and Stierwalt. Id. at *9. In the present case, City Bank does not assert, nor does it need to assert, the status of a Chapter 7 trustee in order to be a transferee protected by the UCC.

Orix, Stierwalt, and Delano Retail Partners all involved applications of the California version of UCC 9-332. As previously mentioned, the Nevada version found at NRS 104.9332(b) is identical. Neither this bankruptcy court, nor the courts of the State of Nevada, are required to follow the decisions of courts in the State of California or any other jurisdiction in interpreting Nevada statutes.[10] In this proceeding, however, the court is persuaded by those decisions and

[10] Historically, Nevada courts have looked to California decisions involving similar statutes or similar legal issues. See generally 1 State Bar of Nev., Nevada Civil Practice Manual § 1.02[11] (6th ed. 2016) ("Moreover, in the years after Nevada became a state, Nevada borrowed extensively from California in various areas of the law."). See, e.g., Clark v. Lubritz, 944 P.2d 861, 865 n.6 (Nev. 1997) (recognizing that "Nevada's statute on punitive damages is a verbatim copy of the California punitive damages statute") (internal quotation marks omitted); Commercial Standard Ins. Co. v. Tab Constr., Inc., 583 P.2d 449, 451 (Nev. 1978) (Nevada Supreme Court based its holding on decisions of the California Supreme Court and a California appellate court that interpreted similar statutory language governing the limitations period for an action on a surety bond); Parker v. Chrysler Motors Corp., 502 P.2d 111, 112 (Nev. 1972) (wherein the Nevada Supreme Court adopted the reasoning of the California Supreme Court over the views of the Nevada district court on the same issues presented on appeal).

concludes that under NRS 104.9332(b), City Bank is a transferee of the funds from the Cash Collateral Account and took those funds free of the security interest asserted by US Bank.

In addition to this conclusion, the court already has found to be without merit US Bank's contention that it legally owned the funds in the Cash Collateral Account. As a result of the conclusions expressed above, it is unnecessary to determine whether US Bank perfected its security interest in the Cash Collateral Account, nor whether US Bank is entitled to attorney's fees and costs under NRS 31.070(1).

IT IS THEREFORE ORDERED that the Petition for Return of Improperly Garnished Property, brought by U.S. Bank National Association, as Trustee, Successor-in-Interest to Bank of America, N.A., as Trustee, Successor by Merger to LaSalle Bank National Association, as Trustee, for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2005-PWR7, Adversary Docket No. 531, be, and the same hereby is, **DENIED**.

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