



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
September 27, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:

CHARLESTON ASSOCIATES, LLC,

Debtor.

CHARLESTON ASSOCIATES, LLC, a
Delaware limited liability company,

Plaintiff,

v.

RA SOUTHEAST LAND COMPANY,
LLC, a Nevada limited liability company,
et al.,

Defendants.

CITY NATIONAL BANK, a national
banking association,

Counterclaimant,

v.

CHARLESTON ASSOCIATES, LLC, a
Delaware limited liability company,

Counterdefendant.

Case No. 13-10499-MKN
Chapter 11

Adv. Proc. No. 10-01452-MKN

Date: September 5, 2018
Time: 9:30 a.m.

**ORDER ON MOTION OF CITY
NATIONAL BANK FOR RULE 54(b)
CERTIFICATION OF ORDER ON
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DISMISSAL WITH
PREJUDICE OF REMAINING CLAIMS**

On September 5, 2018, the court heard the Motion of City National Bank for Rule 54(b) Certification of Order on Motion for Partial Summary Judgment and Dismissal with Prejudice of Remaining Claims (“54(b) Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On June 17, 2010, a voluntary Chapter 11 petition was filed by Charleston Associates, LLC (“Debtor”), in the United States Bankruptcy Court for the District of Delaware (“Delaware Bankruptcy Court”). (ECF No. 1).¹

On November 24, 2010, Debtor commenced an adversary proceeding against RA Southeast Land Company, LLC (“RAS”) and City National Bank (“CNB”), by filing a “Complaint for Declaratory Judgment” in the Delaware Bankruptcy Court. (AECF No. 1). The focal point of this dispute (“RAS Adversary Proceeding”) between the Debtor, its previous lender (CNB), and the purchaser from the lender (RAS), is on the rights with respect to certain undeveloped land located in Las Vegas, Nevada (“Undeveloped Land”).

On December 29, 2010, the Delaware Bankruptcy Court entered an order transferring venue of the RAS Adversary Proceeding to Nevada, where it was assigned Adversary No. 10-01452-LBR. On February 25, 2011, Debtor filed an amended complaint (“Complaint”) framed as six “counts,” i.e., causes of action or claims for relief. (AECF No. 37). Count I, apparently against both RAS and CNB, seeks a declaration that the Debtor, not RAS, is the Declarant under the REA.² Count II against both RAS and CNB seeks a declaration that both defendants violated the automatic stay and that sanctions for the violation are appropriate.

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. 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 adversary docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence. All references to “FRAP” are to the Federal Rules of Appellate Procedure.

² The prayer immediately following the allegations of Count I seeks a declaration only in favor of the Debtor and against RAS.

1 Additionally, Count III of the Complaint, against only RAS, seeks a declaration that RAS
 2 separately violated the automatic stay by removing various signs from the Undeveloped Land.³
 3 Count IV against only RAS alleges that RAS intentionally interfered with the Debtor's
 4 Contractual relationships with its tenants. An additional Count IV against only RAS alleges that
 5 RAS tortiously interfered with prospective economic advantage. Mis-numbered Count V against
 6 both RAS and CNB alleges slander of title with respect to the Undeveloped Land.

7 On March 28, 2011, CNB answered the Complaint, and also asserted a counterclaim
 8 ("CNB Counterclaim"). (AECF No. 54). The counterclaim is framed as six separate claims for
 9 relief against the Debtor: First - Breach of Contract, Second - Breach of Implied Covenant of
 10 Good Faith and Fair Dealing, Third - Declaratory Relief, Fourth - Fraudulent Inducement, Fifth -
 11 Negligent Misrepresentation, and Sixth - Slander of Title.⁴

12 On March 29, 2011, RAS also answered the Complaint, and also asserted a single
 13 counterclaim seeking declaratory relief and damages ("RAS Counterclaim"). (AECF No. 56).
 14 In its counterclaim, RAS alleges, inter alia, that "Charleston and CNB entered into an agreement
 15 ("Settlement Agreement") under which, among other things, Charleston agreed to a "friendly
 16 foreclosure" under which it would not contest CNB's efforts to cause there to be a Trustee's sale
 17 of the Undeveloped Property under the Deed of Trust." RAS Counterclaim at ¶ 15. It further
 18 alleges that "On August 11, 2009, pursuant to the Settlement Agreement, the Trustee's sale of
 19 the Undeveloped Land took place. Through a credit bid CNB acquired the Undeveloped Land
 20 and the inseparable right to become the successor Declarant pursuant to Section 1.5 of the REA."
 21 Id. at ¶ 16. Moreover, RAS alleges that "By deed recorded on October 4, 2010, RAS acquired
 22

23 ³ Counts II and III allege: that the actions taken by CNB and RAS after the
 24 commencement of the Chapter 11 proceeding on June 17, 2010, violated the automatic stay
 25 under Section 362(a); that various documents recorded by CNB and RAS are void as a matter of
 26 law; and that CNB and RAS are subject to sanctions under Section 362(k).

27 ⁴ After setting forth the six separate counterclaims for relief, CNB alleges an unnumbered
 28 "Request for Relief" in the form of rescission and/or reformation of the Settlement Agreement in
 the event the court concludes that there is an equitable basis to do so. See CNB Counterclaim at
 ¶¶ 109, 110, 111, 112, 113, 114, 115, and 116.

1 the Undeveloped Land from CNB.” Id. at ¶ 24. As of the result of the Debtor’s conduct
2 interfering with RAS’s receipt and enjoyment of the Declarant Rights, see id. at ¶ 18, the prayer
3 of RAS’s counterclaim seeks entry of “an order (1) declaring that RAS Southeast Land
4 Company, LLC is the Declarant under the REA, (2) declaring the Post-Foreclosure Amendment
5 of the REA null and void, (3) declaring that the filing of the Post-Foreclosure Amendment
6 constitutes slander of title, and (4) awarding RA Southeast Land Company, LLC damages, costs
7 of suit, and reasonable attorneys fees.” Id. at 7:14-18.

8 On April 21, 2011, Debtor filed answers to the RAS Counterclaim and the CNB
9 Counterclaim. (AECF Nos. 63 and 65).

10 On May 10, 2011, CNB filed a motion for summary judgment on all claims against it in
11 the Debtor’s Complaint, i.e., Count I, Count II, and Count V, as well as on CNB’s Third
12 Counterclaim for declaratory relief. (AECF No. 68).

13 On May 11, 2011, RAS filed a motion for summary judgment on all claims against it in
14 the Debtor’s Complaint, i.e., Count I, Count II, Count III, both Counts IV, and Count V, as well
15 as on RAS’s counterclaim. That summary judgment motion by RAS did not request that the
16 damages, costs of suit, and reasonable attorney’s fees sought in the prayer of the RAS
17 Counterclaim be awarded by summary judgment. (AECF No. 75).

18 On June 20, 2011, Debtor filed a combined opposition to both summary judgment
19 motions along with a countermotion for partial summary judgment on Counts I and II of its
20 Complaint. As previously mentioned at 3, supra, those two Counts seek a declaration that the
21 Debtor possessed the Declarant Rights under the REA, and that both CNB and RAS violated the
22 automatic stay by foreclosing on the Undeveloped Land and taking other actions thereafter.
23 (AECF No. 92).

24 On July 11, 2011, RAS filed a reply in support of its summary judgment motion
25 combined with an opposition to the Debtor’s countermotion. (AECF No. 110). On the same
26 date, CNB also filed its reply and opposition. (AECF No. 112).

1 On July 25, 2011, a hearing was conducted on the summary judgment motions as well as
2 the countermotion. The motions by CNB and RAS were denied. The countermotion by the
3 Debtor was granted.

4 On October 5, 2011, an Order on Motions for Summary Judgment was entered, denying
5 the summary judgment motions of CNB and RAS, and granting the countermotion for summary
6 judgment brought by the Debtor. (AECF No. 120).

7 On December 1, 2011, an order was entered certifying the Order on Motion for Summary
8 Judgment under FRCP 54(b). (AECF No. 145). On the same date, a Partial Summary Judgment
9 was entered. (AECF No. 146). Additionally, a Supplemental Order on Summary Judgment
10 Motions was entered.⁵ (AECF No. 147).⁶

11 On December 14, 2011, RAS filed a notice of appeal. (AECF No. 151).⁷ On the same
12 date, CNB also filed a notice of appeal. (AECF No. 153).⁸

13 On December 15, 2011, CNB filed an election for its appeal to be heard by the United
14 States District Court for the District of Nevada ("USDC"). (AECF No. 156).⁹

15
16 ⁵ The Supplemental Order specifies that CNB's summary judgment motion is denied,
17 RAS's summary judgment motion is denied, and that Debtor's countermotion is granted in its
18 entirety. It further specifies that the Debtor is the Declarant under the REA. It also states that
19 with "respect to the first and second causes of action asserted by Charleston, CNB and RAS are
declared to have violated the automatic stay." However, as previously mentioned at 3, supra,
only Count II in the Complaint alleges that both CNB and RAS violated the automatic stay.

20 ⁶ The initial Order on Summary Judgment Motions entered on October 5, 2011, the
21 Partial Summary Judgment entered on December 1, 2011, and the Supplemental Order on
22 Summary Judgment Motions entered December 1, 2011, are hereafter referred to as "Prior PSJ
Order."

23 ⁷ RAS's appeal encompassed both summary judgment orders as well as the partial
24 summary judgment.

25 ⁸ CNB's appeal encompassed the partial summary judgment and the supplemental
26 summary judgment order.

27 ⁹ RAS also filed a statement of election to have its appeal heard by the USDC. The
28 statement of election apparently was filed with the Bankruptcy Appellate Panel of the Ninth
Circuit, with a copy filed with the USDC, but not with the bankruptcy court. The CNB and RAS
appeals of the Prior PSJ Order were assigned to the same district judge and were denominated

1 On September 28, 2012, an order was entered by the Delaware Bankruptcy Court
 2 confirming the Debtor's Chapter 11 plan of reorganization ("Plan"). (ECF Nos. 725 and 809).
 3 Pursuant to the confirmed plan, New Boca Syndications Group, LLC ("New Boca") acquired the
 4 shopping center, see Plan, Art. II., A., 8, which generates rental proceeds from its various
 5 tenants. In addition to acquiring the shopping center, New Boca assumed the Debtor's liability
 6 for the claims asserted by CNB and RAS in the RAS Adversary Proceeding. See Plan, Art. VII.,
 7 C.

8 On January 15, 2013, the Delaware Bankruptcy Court entered an order transferring venue
 9 of the Chapter 11 proceeding to Nevada, where it was assigned Case No. 13-10499-LBR.¹⁰

10 On July 25, 2013, the USDC entered an order reversing the Nevada bankruptcy court's
 11 Prior PSJ Order ("Reversal Order"). (USECF No. 70;¹¹ AECF No. 207).

12 On August 23, 2013, Debtor filed a notice appealing the Reversal Order to the United
 13 States Court of Appeals for the Ninth Circuit ("Ninth Circuit").¹² (USECF No. 78).

14 On January 25, 2016, the Ninth Circuit affirmed the USDC's Reversal Order ("Circuit
 15 Order"). 632 Fed. Appx. 362 (9th Cir. 2016).¹³

16 Case Nos. 2:11-cv-02023-MMD-PAL and 2:11-cv-2104-MMD-NJK. The first case was
 17 designated as the lead case.

18 ¹⁰ On December 29, 2014, both the Chapter 11 proceeding and the RAS Adversary
 19 Proceeding were reassigned to this court upon the retirement of the previously assigned
 20 bankruptcy judge.

21 ¹¹ All references to "USECF No." are to the documents filed with the USDC in the lead
 22 case on appeal. This court may take judicial notice under FRE 201 of the materials appearing on
 23 the docket of the USDC. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde
v. Open Door Marketing, LLC, 223 F.Supp.3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams,
 2012 WL 3962458, at *1 n.1 (D. Nev. Sep. 7, 2012).

24 ¹² On August 26, 2013, the bankruptcy court entered summary judgment in favor of CNB
 25 and RAS pursuant to the Reversal Order. (AECF No. 210). On November 5, 2013, however, the
 26 USDC granted the Debtor's motion for an order directing the bankruptcy court to vacate that
 27 summary judgment order because it had been entered prematurely. (USECF No. 99; AECF No.
 226).

28 ¹³ On May 24, 2017, CNB filed in the RAS Adversary Proceeding and in the Chapter 11
 case, a motion to substitute New Boca as the plaintiff and counterclaim defendant, and to enforce

1 On February 17, 2016, after expiration of the period for filing a petition for rehearing
2 under FRAP 41(b), the Ninth Circuit mandate to the USDC was entered. (USECF No. 108).

3 On March 3, 2016, the USDC entered an order spreading the Ninth Circuit mandate on
4 the record in the case. (USECF No. 111).

5 On October 5, 2017, an order was entered scheduling ten non-consecutive trial days for
6 the instant adversary proceeding, between September 4, 2018 and October 4, 2018. (AECF No.
7 513). The order also scheduled a pretrial conference to be conducted on August 15, 2018, and
8 also set forth various discovery deadlines.

9 On March 26, 2018, CNB filed a Motion for Partial Summary Judgment (“Partial MSJ”).
10 (AECF No. 580). CNB sought summary judgment on its First Counterclaim and Second
11 Counterclaim, i.e., for breach of contract and breach of the implied covenant of good faith and
12 fair dealing, against both the Debtor and New Boca.

13 On May 14, 2018, Debtor filed an opposition to the Partial MSJ. (AECF No. 593).
14

15 the Plan with respect to the attorney’s fees that had been awarded by the USDC (“Substitution
16 Motion”). (AECF No. 466; ECF No. 936). First American Title Company, as assignee of the
17 claims of RAS, filed a joinder. (AECF No. 472). An opposition was filed by the Debtor (AECF
18 No. 473), and CNB filed a reply. (AECF No. 475). On June 21, 2017, the Substitution Motion
19 was heard by this court and was granted in part and denied in part. On July 7, 2017, a written
20 order on the motion was entered (“Substitution Order”) in the RAS Adversary Proceeding and in
21 the Chapter 11 case. (AECF No. 494; ECF No. 953). The Substitution Order granted the motion
22 and directed New Boca, “as the reorganized debtor and successor to” the Debtor under the
23 confirmed Chapter 11 plan, to pay the attorney’s fees awarded by the USDC. The Substitution
24 Order also denied without prejudice CNB’s request to join New Boca as a party to the RAS
25 Adversary Proceeding. On July 18, 2017, a separate judgment against New Boca in the amount
26 of \$540,088.55 was entered in favor of CNB in the RAS Adversary Proceeding and in the
27 Chapter 11 case. (AECF No. 496; ECF No. 958). CNB successfully garnished certain rents that
28 had been deposited into certain accounts maintained by New Boca at Wells Fargo Bank. On
September 27, 2017, CNB filed a Satisfaction of Judgment. (AECF No. 510).

25 Thereafter, U.S. Bank National Association, N.A. (“US Bank”) filed a Petition for Return
26 of Improperly Garnished Property, asserting that it had a superior interest in the rent deposits.
27 (AECF No. 531). That Petition was filed by US Bank as a pleading in the RA Southeast
28 Adversary and was opposed by CNB. On December 12, 2017, this court entered an order
denying the Petition. (AECF No. 539). US Bank appealed that order to the USDC. (AECF No.
546).

1 On May 24, 2018, CNB filed a reply in support of the Partial MSJ. (AECF No. 599).

2 On June 5, 2018, a hearing was conducted on the Partial MSJ and the matter was taken
3 under submission.

4 On July 24, 2018, a Memorandum Decision on Motion for Partial Summary Judgment
5 (“Memorandum Decision”) was entered along with an order granting partial summary judgment
6 in favor of CNB on Counts I, II, and V of the Amended Complaint, as well as the First Claim for
7 Relief and the Third Claim for Relief in the CNB Counterclaim (“CNB PSJ Order”). (ECF Nos.
8 617 and 618). The order denied without prejudice the Second Claim for Relief in the CNB
9 Counterclaim. The order further awarded the amount of \$6,851,030.98 in favor of CNB and
10 against the Debtor as damages under the First Claim of Relief in the CNB Counterclaim.

11 On July 30, 2018, CNB filed the instant 54(b) Motion that was noticed to be heard on
12 September 5, 2018. (ECF Nos. 629 and 630).

13 On August 23, 2018, Debtor filed an opposition to the 54(b) Motion (“Opposition”).
14 (ECF No. 635).

15 On August 29, 2018, CNB filed a reply to the Debtor’s Opposition (“Reply”). (ECF No.
16 636).

17 **DISCUSSION**

18 By the instant motion, CNB seeks to dismiss with prejudice its Second Claim for Relief,
19 Fourth Claim for Relief, Fifth Claim for Relief, and Sixth Claim for Relief in its Counterclaim.
20 See 54(b) Motion at 11:2-5. More important, CNB seeks to certify the CNB PSJ Order pursuant
21 to FRCP 54(b), so that a final judgment can be entered as to all claims between the Debtor and
22 CNB. Id. at 11:5-7. Regardless of whether the court certifies the CNB PSJ Order under FRCP
23 54(b), CNB requests dismissal of the aforementioned portions of its Counterclaim. Debtor does
24 not oppose the requested dismissal but does oppose the certification request. RAS does not
25 oppose either aspect of the relief requested by CNB.

26 FRCP 54(b) is entitled “Judgment on Multiple Claims or Involving Multiple Parties” and
27 clearly applies to the RAS Adversary Proceeding that involves both multiple claims and multiple
28 parties. It also is clear that the CNB PSJ Order did not resolve the claims between the Debtor

1 and RAS that are alleged in the Complaint as well as the RAS Counterclaim. The specific
2 language of the rule is as follows:

3 When an action presents more than one claim for relief--whether as a claim,
4 counterclaim, crossclaim, or third-party claim--or when multiple parties are
5 involved, **the court may direct entry of a final judgment as to one or more,
6 but fewer than all, claims or parties only if the court expressly determines
7 that there is no just reason for delay. Otherwise,** any order or other decision,
8 however designated, that adjudicates fewer than all the claims or the rights and
liabilities of fewer than all the parties does not end the action as to any of the
claims or parties and **may be revised at any time before the entry of a
judgment adjudicating all the claims and all the parties' rights and liabilities.**

9 FED.R.CIV.P. 54(b)(emphasis added).

10 The determination of whether there exists “no just reason for delay” in the entry of a
11 judgment lies in the discretion of the trial court. See *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446
12 U.S. 1, 8 (1980). The trial court “must take into account judicial administrative interests as well
13 as the equities involved.” *Id.* This may include such factors as “whether the claims under
14 review are separable from others remaining to be adjudicated and whether the nature of the
15 claims already determined was such that no appellate court would have to decide the same issues
16 more than once even if there were subsequent appeals.” *Id.*

17 In this instance, all claims between the Debtor and CNB have been resolved as a result of
18 the CNB PSJ Order and the dismissal with prejudice of the remaining claims for relief in the
19 CNB Counterclaim. As there are no claims between CNB and RAS, the inquiry under FRCP
20 54(b) is whether there is a just reason to delay entry of a judgment in favor of CNB while the
21 RAS Adversary Proceeding is completed between the Debtor and RAS.

22 Because the Reversal Order and the Circuit Order directed that summary judgment be
23 awarded in favor of RAS on the allegations of the Complaint as well as the RAS Counterclaim,
24 see Memorandum Decision at 14:2 to 15:23, the rule of mandate will require that judgment be
25 entered in favor of RAS. *Id.* at 17:19-22.¹⁴ With respect to RAS, the only remaining issues are

26
27 ¹⁴ In addition to granting the Partial MSJ in favor of CNB based on the rule of mandate,
28 the court also granted summary judgment in favor of CNB on the First Claim for Relief in the
CNB Counterclaim based on the law of the case doctrine. See Memorandum Decision at 17:24
to 22:15.

the amount of damages, costs of suit, and attorney's fees to be awarded on its Counterclaim. Id. at 17:22-23. At the hearing on the instant 54(b) Motion, counsel for RAS represented that an appropriate motion would be filed by RAS in the near future seeking entry of judgment in favor of RAS pursuant to the Reversal Order and Circuit Order.

The damages, costs of suit and attorney's fees to be awarded to RAS are clearly separable from the amounts awarded to CNB by the CNB PSJ Order. Debtor's liability to both RAS and CNB already has been established under the law of the case doctrine. A later appeal of an award in favor of RAS will not require an appellate court to decide the same issue more than once. Entry of a final judgment in favor of CNB obviously will reduce the number of parties remaining in the RAS Adversary Proceeding.

Under these circumstances, the court concludes that there is no just reason to delay entry of a judgment in favor of CNB.¹⁵

IT IS THEREFORE ORDERED that the Motion of City National Bank for Rule 54(b) Certification of Order on Motion for Partial Summary Judgment and Dismissal with Prejudice of Remaining Claims Docket No. 629, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED that counsel for City National Bank shall submit a form of judgment on the Complaint in this adversary proceeding, as well as its Counterclaim in this adversary proceeding, consistent with the determinations of this court.

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¹⁵ At the hearing and in their legal memoranda, the parties discussed whether a "pragmatic approach" should be followed in bankruptcy cases that results in "flexible finality" being given to partial judgments considered under FRCP 54(b). Compare 54(b) Motion at 8:1 to 9:22, with Opposition at 2:21 to 4:6. Application of a lesser standard is not required in this instance because the Debtor's liability already has been determined on appeal and only discrete, separable issues were left to be resolved by the bankruptcy court.

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