Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
May 03, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 11-21014-MKN
	)	Chapter 11
NIGRO HQ LLC,	)	
	)	
Debtor.	)	Date: April 30, 2019
	)	Time: 11:00 a.m.
	)	

ORDER REGARDING WELLS FARGO BANK, N.A.'S OBJECTIONS TO THE DIRECT TESTIMONY OF TODD NIGRO[1]

On April 30, 2019, a pre-trial conference was held in the above-referenced Chapter 11 case in reference to the Limited Objection to Wells Fargo's POC 5-2, brought by Nigro HQ LLC ("Nigro HQ"). (ECF No. 539). A three-day trial is currently scheduled to be held on May 10, 13, and 14, 2019.[2] The trial is limited to whether there are equitable considerations that would deny enforcement of Wells Fargo's claim to Default Interest under Nevada law.[3] Counsel for

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the particular case as they appear on the docket maintained by the clerk of court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRE" are to the Federal Rules of Evidence.

[2] In addition to the above-referenced Chapter 11 case, the trial also encompasses virtually identical disputes arising in two related Chapter 11 cases: In re Beltway One Development Group LLC, Case No. 11-21026-MKN ("Beltway One), and In re Horizon Village Square, LLC, Case No. 11-21034-MKN ("Horizon Village").

[3] In the Horizon Village proceeding, the issue arises in connection with a separate objection to the proof of claim filed by Wells Fargo Bank, N.A. ("Wells Fargo") in that case. (Horizon ECF No. 529). In the Beltway One proceeding, the issue arises in connection with a published decision of the Bankruptcy Appellate Panel for the Ninth Circuit, reversing this court's order confirming a Chapter 11 plan that did not provide for Default Interest on Wells Fargo's

Wells Fargo and for Nigro HQ appeared at the pre-trial conference. At the pre-trial conference, the court heard arguments on Wells Fargo Bank, N.A.'s Objections to the Direct Testimony of Todd Nigro ("Objection"). (ECF No. 745).[4] After arguments were presented, the matter was taken under submission.[5]

BACKGROUND

On July 13, 2011, three separate voluntary Chapter 11 reorganization proceedings were commenced by Nigro HQ, Beltway One, and Horizon Village Square. For all three Chapter 11 debtors in possession, the primary secured creditor is Wells Fargo, which made separate real estate secured loans to each debtor. Each of the loans is personally guarantied by the principals of each entity. Each of the loan agreements includes a provision requiring the borrower to pay an additional three percent interest in the event of default ("Default Interest"). Each of the loans matured prior to commencement of the Chapter 11 proceedings and had not been paid in full.[6]

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allowed secured claim. See Wells Fargo Bank, N.A. v. Beltway One Dev. Group, LLC (In re Beltway One Dev. Group, LLC), 547 B.R. 819 (B.A.P. 9th Cir. 2016) ("Beltway Decision"). On July 17, 2017, an order was entered approving a stipulation setting the Evidentiary Hearing to be conducted in all three Chapter 11 cases. (Beltway One ECF No. 504).

[4] Substantially identical objections were filed in the Beltway One and Horizon Village proceedings. In addition to the instant Objection, separate objections were filed by Wells Fargo and Nigro HQ as to other trial matters. Those separate objections, in substantially identical form, also were filed in the Beltway One and Horizon Village proceedings. The other objections are addressed in separate orders filed in the separate proceedings.

[5] The pre-trial conference originally was scheduled to be held on April 24, 2019 (Nigro ECF No. 723), but was continued to April 30, 2019, as a result of a calendaring error. (Nigro ECF No. 755). Although various other objections in all three proceedings were discussed at the pre-trial conference, the court enters the instant order in the Nigro HQ proceeding at this time so as to provide the earliest guidance to counsel. Similar orders with respect to the substantially similar objection in the Beltway One and Horizon Village proceedings will be entered at the earliest opportunity. Separate orders as to the other objections raised in all three proceedings will be entered as well.

[6] A fourth voluntary Chapter 11 petition also was filed on July 13, 2011, by Ten Saints, LLC ("Ten Saints"), denominated Case No. 11-21028-MKN. Wells Fargo was the primary secured creditor that had made a real estate loan to the debtor entity. The loan was personally guarantied by the principals and the loan matured prior to the commencement of the Chapter 11 proceeding. The debtor in possession and Wells Fargo reached a consensual treatment of the latter's claim that was incorporated in a Second Amended Plan of Reorganization. (Ten Saints

On January 8, 2018, orders were entered denying Wells Fargo's motion for partial summary judgment in all three Chapter 11 proceedings on the enforceability of its Default Interest provision under Nevada law. (Nigro HQ ECF No. 614; Beltway ECF No. 541; Horizon ECF No. 633).[7] The court determined that there were material facts in dispute and that a determination could not be made without an adequate evidentiary record.

On April 3, 2018, orders were entered approving a stipulation to continue an evidentiary hearing ("Evidentiary Hearing") in each of the Chapter 11 cases to resolve a common issue: whether there are equitable considerations that would deny enforcement of Wells Fargo's claim to Default Interest under Nevada law.[8] That Evidentiary Hearing was continued to October 9, 15 and 16, 2018. (Nigro ECF No. 633).[9]

On September 5, 2018, the Chapter 11 debtors in each of the cases filed a Motion to Compel Wells Fargo Bank, N.A. to Produce Improperly Withheld, Non-Privileged Documents and Revise Privilege Log ("Motion to Compel") that is identical in all material respects. (Nigro HQ ECF No. 656; Beltway One ECF No. 584; Horizon Village ECF No. 675). Because of the imminent deadlines for various materials to be filed prior to the Evidentiary Hearing, the Motion

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ECF No. 317). On September 9, 2013, an order was entered confirming that amended plan. (Ten Saints ECF No. 324). On November 18, 2013, a final decree was entered and the case was closed. (Ten Saints ECF Nos. 354 and 355).

[7] The order entered in the Beltway One proceeding denying summary judgment was incorporated by reference in the orders entered in the Nigro HQ and Horizon Village proceedings.

[8] In the Nigro HQ and Horizon Village proceedings, the issue arises in connection with the separate objections to the proofs of claim filed by Wells Fargo in those cases. (Nigro ECF No. 539; Horizon ECF No. 529). In the Beltway One proceeding, the issue arises in connection with a published decision of the Bankruptcy Appellate Panel for the Ninth Circuit, reversing this court's order confirming a Chapter 11 plan that did not provide for Default Interest on Wells Fargo's allowed secured claim. See Wells Fargo Bank, N.A. v. Beltway One Dev. Group, LLC (In re Beltway One Dev. Group, LLC), 547 B.R. 819 (B.A.P. 9th Cir. 2016) ("Beltway Decision"). On July 17, 2017, an order was entered approving a stipulation setting the Evidentiary Hearing to be conducted in all three Chapter 11 cases. (Beltway ECF No. 504).

[9] On or about the same date, an identical order was entered in the Beltway One and Horizon Village proceedings. (Beltway ECF No. 557; Horizon ECF No. 652).

to Compel in all three cases was heard on an emergency basis on September 14, 2018. In addition to the Motion to Compel, the court also heard a Motion in Limine Regarding Settlement Negotiations ("Limine Motion") that was filed by Wells Fargo in each case. (Nigro HQ ECF No. 663; Beltway One ECF No. 591; Horizon Village ECF No. 684). Oppositions were filed by the Chapter 11 debtors in each case. (Nigro HQ ECF No. 672; Beltway One ECF No. 600; Horizon Village ECF No. 693).

On September 14, 2018, both the Motion to Compel and the Limine Motion were heard in each case. The appearances of counsel were noted on the record. After the hearing, both matters in all three cases were taken under submission.

On September 19, 2018, orders were entered granting the Motion to Compel in all three Chapter 11 proceedings. (Nigro HQ ECF No. 681; Beltway One ECF No. 610; Horizon Village ECF No. 702).[10]

On September 27, 2018, a status hearing was held in all three Chapter 11 proceedings to determine, *inter alia*, continued dates for the Evidentiary Hearing and for completion of the discovery that was the subject of the Motion to Compel.[11]

On or about October 4, 2018, orders were entered on the Limine Motion ("Limine Order"). (Nigro HQ ECF No. 693; Beltway One ECF No. 621; Horizon Village ECF No. 714). The Limine Motion was denied without prejudice to Wells Fargo raising any objections under FRE 408 at the Evidentiary Hearing concerning settlement communications between the parties.

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[10] The "Order Regarding Motion to Compel Wells Fargo Bank, N.A., to Produce Improperly Withheld, Non-Privileged Documents and Revise Privilege Log" entered in the Nigro HQ case ("Motion to Compel Order") was incorporated by reference in the orders entered in the Beltway One and Horizon Village cases.

[11] In the Motion to Compel, the Chapter 11 debtors requested an order preventing the accrual of any default interest, if at all, during the period in which Wells Fargo has failed to provide sufficient responses to the document requests at issue. See, e.g., Nigro HQ Motion to Compel at 4:8-13 and 21:20-22. The Motion to Compel Order neither granted nor denied that request. At the status hearing on September 27, 2018, the court informed counsel that the request could be renewed after Wells Fargo otherwise complies with the Motion to Compel Order.

On April 8, 2019, Nigro HQ filed the Direct Testimony of Todd Nigro Pursuant to Local Rule 9017 ("Nigro Declaration"). (Nigro ECF No. 735).

On April 17, 2019, Wells Fargo filed the instant Objection to certain portions of the Nigro Declaration. (Nigro ECF No. 745)

On April 22, 2019, Nigro HQ filed its response to the Objection. (Nigro ECF No. 769).

DISCUSSION

In the Beltway Decision, the BAP directed this court on remand to "apply the presumptive rule that Wells Fargo was entitled to the default rate for its pendency interest, provided that such rate is not unenforceable under Nevada law." 547 B.R. at 830 (emphasis added). The BAP also observed that "the presumptive rule for default interest is also subject to rebuttal based on equitable considerations." Id. It directed this court to apply the presumptive rule on remand and to "make the appropriate findings." Id. The purpose of the Evidentiary Hearing, therefore, is to afford the Chapter 11 debtors an opportunity to present evidence to rebut the presumptive rule requiring enforcement of Wells Fargo's claim for Default Interest. Once the evidence is presented, the court will enter its findings to determine if the presumption has been rebutted.

This limited scope of the Evidentiary Hearing was expressly referenced in the Limine Order:

> In this instance, there is no dispute as to the validity or amount of Wells Fargo's claim for Default Interest. The Chapter 11 debtors do not dispute that it defaulted on the underlying loan obligation to Wells Fargo and that the amount of Default Interest is readily capable of calculation. As already observed, however, the relevant inquiry outlined by the BAP in its Beltway Decision is whether there are equitable considerations sufficient under Nevada law to overcome the presumption in favor of enforcing the Default Interest provision…The precise scope of the "equitable considerations" under Nevada law that may be presented by the Chapter 11 debtors has not been delineated at the juncture. As the validity and amount of Wells Fargo's claim for Default Interest is not at issue, Wells Fargo has not identified the basis for excluding the settlement communications for all purposes.

Limine Order at 13-15.

Because the sole focus of the Evidentiary Hearing will be Wells Fargo's claim for Default Interest, the court views the current Objections to the Nigro Declaration in that context.

Because neither of the parties have offered controlling authority suggesting the "equitable considerations" under Nevada law that may rebut the presumptive rule, the court also views the current Objections in that context.

The Nigro Declaration consists of sixty paragraphs containing statements under penalty of perjury, that Nigro HQ offers as direct testimony of its principal. Wells Fargo objects to the following paragraphs: 5, 6, 7, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 25-35, 37, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60. For the most part, Wells Fargo's objections are summarily stated by reference to the following: FRE 402 and 403 (relevance and relevance limitations), 408 (settlement negotiations), 602 (lack of personal knowledge), 701 (lay opinion), 702 (expert opinion), 802 (hearsay), and 1002 (best evidence).

At the pre-trial conference, counsel for both parties sought guidance primarily on the portions of the Nigro Declaration referring to settlement discussions allegedly held between Nigro HQ's principal and a representative of Wells Fargo. In particular, Wells Fargo expressed concern about the statements referenced in Paragraphs 25 through 35.[12] The court having reviewed those portions of the Nigro Declaration, is not convinced that they implicate FRE 408. Under FRE 408(a), the prohibition on the admission of settlement communications defined under subsections (1) and (2), applies to efforts to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Both subsections (1) and (2) reference only communications concerning the claim in dispute. In this instance, there is only one claim in dispute between Wells Fargo and Nigro HQ: the Default Interest claim for which the Beltway Decision requires this Evidentiary Hearing.

A review of the Nigro Declaration reveals that the principal's testimony makes no mention whatsoever of communications concerning "default interest" in Paragraphs 25 through 35. In fact, the principal mentions "default interest" only in Paragraphs 10, 35, 38, 42, 43, 53, 54, 55, 56, and 60 of the Nigro Declaration. More particularly, only Paragraphs 54 and 56

[12] At the hearing, counsel specifically referred to Paragraphs 22 through 32 of the declaration submitted by the principal in the Horizon Village proceeding, which are substantially similar to the contents of Paragraphs 25 through 35 of the declarations submitted in the Nigro HQ and Beltway One matters.

contain statements to which Wells Fargo objects under FRE 408. Both of those paragraphs, however, refer to settlement negotiations Wells Fargo had with Ten Saints, but do not mention settlement communications concerning the Default Interest claim against Nigro HQ. Thus, the concerns addressed in FRE 408 do not apply to the paragraphs of the Nigro Declaration to which Wells Fargo objects.

As previously discussed in connection with the Limine Motion, Wells Fargo also maintains that it entered into a "Pre-Negotiation Agreement" dated June 8, 2010 ("PNA"). See Limine Order at 4:22 to 5:8. Based on the language of the PNA, Wells Fargo maintains that the parties intended to prohibit introduction of "all evidence of conduct and all communications…in connection with the discussions and negotiations" in a manner broader than FRE 408.[13] See Limine Motion at 3:27 to 5:12. See also Objection at 2 n.1. Wells Fargo argues that courts "routinely uphold and enforce pre-negotiation agreements between lenders and borrowers." See Limine Motion at 3:28 to 4:15, citing PNC Bank, Nat'l Ass'n v. Irvin Family Ltd. P'ship, 2015 WL 6456566, at *11 (M.D.La. Oct. 26, 2015), In re Vargas Realty Enterprises, Inc., 440 B.R. 224, 237, 243-44 (S.D.N.Y. 2010), Windsor I, LLC v. CWCapital Asset Mgmt. LLC, 2017 WL 3499919, at *3 n.18 (Del.Ch. July 31, 2017), Soffer v . Bank of Nova Scotia, 2014 WL 2938454 (Nev. June 24, 2014). A careful reading of the cases cited, however, does not support Wells Fargo's position.

The PNC Bank decision addressed the admissibility of a pre-negotiation agreement into evidence, rather than the enforcement of a broad admissibility restriction contained in a pre-negotiation agreement. 2015 WL 6456566, at *11-12. Similarly, the Vargas Realty decision addressed the contractual validity of a pre-negotiation agreement, rather than the enforcement of

[13] The referenced language of the PNA stated in pertinent part: "All evidence of conduct and all communications…between Lender and Obligators and their Representatives in connection with the discussions and negotiations shall be inadmissible for any purpose whatsoever in any judicial or similar proceeding. The foregoing is intended to be broader than the restrictions on admissibility contained in Rule 408 of the Federal Rules of Evidence." Limine Order at 5:4-7.

language exceeding the scope of FRE 408. 440 B.R. at 242-43.[14] The Windsor I decision simply denied specific performance of a pre-negotiation agreement and did not address the enforceability of an admissibility restriction in the agreement. 2017 WL 3499919, at *5. Finally, the Soffer decision by Nevada's highest court concluded that a pre-negotiation agreement did not create a binding contract under New York law and never addressed the admissibility of settlement negotiations conducted pursuant to the pre-negotiation agreement. 2014 WL 2938454, at *2-3. In short, the cases cited by Wells Fargo do not even suggest that broad admissibility restrictions in pre-negotiation agreements are "routinely" upheld.

As the court previously observed in connection with the Limine Motion, the facilitation purpose of protecting settlement communications is expressed in FRE 408(a). See Limine Order at 5:13 to 6:2. Neither Wells Fargo nor Nigro HQ seriously suggest that their post-default settlement discussions were involuntary, or that the discussions would not have been held absent the language in the PNA. As also previously observed, FRE 408(b) specifically provides for evidence of settlement communications to be admitted for purposes other than to "prove or disprove the validity or amount of a disputed claim…" See Limine Order at 6:2-4. See also Limine Order at 5:9-13 n.11 (examples of other purposes). Moreover, FRE 408(b) expressly directs the court to determine whether settlement communications may be admitted for some other purpose. Neither Wells Fargo nor Nigro HQ has provided any authority that the parties' purported desire to contract away the court's gatekeeping function is enforceable.

Under these circumstances, the specific objections raised by Wells Fargo under FRE 408 and the PNA, to the specific paragraphs of the Nigro Declaration discussed above, are overruled.[15]

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[14] Apparently, the language in the pre-negotiation agreement in Vargas Realty stated only that "'[a]ll negotiations and discussions concerning the Loan…shall constitute settlement discussions…and may not be used or admitted into evidence in any court proceeding,' the 'letter agreement and the acknowledgements by Borrower contained [t]herein may be admitted into evidence in any such proceeding.'" 440 B.R. at 243.

[15] With respect to the parties' separate objections as to items other than the Nigro Declaration, the court will separately address any concerns raised under FRE 408 in separate orders.

Wells Fargo's remaining objections to specific paragraphs of the Nigro Declaration, see discussion at 6, supra, are based on the relevance, personal knowledge, lay and expert opinion, hearsay, and best evidence provisions of FRE 402, 403, 602, 701, 702, 802, and 1002. Because neither Wells Fargo nor Nigro HQ have identified the scope of the "equitable considerations" that may rebut the relevant presumption under Nevada law, the court overrules the relevance objections without prejudice at this time. This ruling is without prejudice to an objection being raised at trial based on waste or cumulative evidence. As to the personal knowledge, impermissible opinion, hearsay, and best evidence objections, the court overrules those objections without prejudice at this time, subject to being raised on cross-examination at trial.

The parties are, of course, permitted and encouraged to resolve any of the foregoing objections prior to the commencement of trial.

IT IS THEREFORE ORDERED that Wells Fargo Bank, N.A.'s Objections to the Direct Testimony of Todd Nigro, Docket No. 745, be, and the same hereby is, **DENIED AS SET FORTH HEREIN.**

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