



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
February 13, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:)	Case No. 13-10499-MKN
)	Chapter 11
CHARLESTON ASSOCIATES, LLC,)	
)	Date: February 6, 2018
Debtor.)	Time: 10:30 a.m.

ORDER ON AMENDED APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION¹

On February 6, 2018, the court heard the Amended Application for Temporary Restraining Order and Motion for Preliminary Injunction (“TRO Application”), brought by U.S. Bank, National Association, 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 (“US Bank”). 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”). (ECF No. 1). On September 28, 2012, a Chapter 11 plan of reorganization

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “AECF” No.” are to the numbers assigned to the documents filed in any adversary proceeding commenced in connection with the bankruptcy case. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 (“Plan”) was confirmed. (ECF No. 809). Pursuant to the confirmed plan, New Boca
2 Syndications Group, LLC (“New Boca”) acquired portions of a shopping center located in
3 Southern Nevada that generates rental proceeds (“Rents”) from various tenants. In addition to
4 acquiring the shopping center, New Boca assumed liability under certain claims asserted against
5 the Debtor by City National Bank, N.A. (“City Bank”) and RA Southeast Land Company, LLC
6 (“RA Southeast”). Those claims are the subject of an adversary proceeding styled as Charleston
7 Associates, LLC v. RA Southeast Land Company, et al., Adversary No. 10-01452-MKN (“RA
8 Southeast Adversary”).

9 On October 5, 2011, an order was entered in the RA Southeast Adversary granting partial
10 summary judgment in favor of the Debtor and against City Bank and RA Southeast. (AECF No.
11 120). The order was appealed to the United States District Court for the District of Nevada
12 (“USDC”). On July 25, 2013, the USDC entered an order reversing the bankruptcy court’s
13 partial summary judgment order. (AECF No. 207). On January 25, 2016, the United States
14 Court of Appeals for the Ninth Circuit (“Ninth Circuit”) affirmed the USDC order. 632
15 Fed.Appx. 362 (9th Cir. 2016). On February 24, 2016, the Ninth Circuit entered a separate order
16 directing to the USDC all requests by City Bank and RA Southeast for legal fees.

17 On April 19, 2017, the USDC entered an order against the Debtor awarding \$540,088.55
18 in attorney’s fees and costs in favor of City Bank. The USDC denied without prejudice City
19 Bank’s request, under the Plan, to enforce against New Boca the Debtor’s liability for the
20 amounts awarded.

21 On April 26, 2017, the USDC entered an order against the Debtor awarding \$370,330.99
22 in attorney’s fees and costs in favor of RA Southeast. The USDC also denied without prejudice
23 RA Southeast’s request, under the Plan, to enforce against New Boca the Debtor’s liability for
24 the amounts awarded.

25 On May 19, 2017, First American Title Insurance Company (“FATCO “), as assignee of
26 RA Southeast, filed a motion in the Debtor’s bankruptcy case to enforce the Plan (“Enforcement
27 Motion”) by requiring New Boca to pay the attorney’s fees and costs that had been awarded by
28 the USDC against the Debtor. (ECF No. 932). Opposition was filed by the Debtor. (ECF No.

1 943). A joinder in FATCO's Enforcement Motion was filed by City Bank. (ECF No. 945). A
2 reply to the Debtor's opposition was filed by FATCO. (ECF No. 946). A joinder in FATCO's
3 reply was filed by City Bank. (ECF No. 947).

4 On June 20, 2017, the FATCO motion was heard and granted by this court. On July 7,
5 2017, a written order was entered granting the Enforcement Motion. (ECF No. 954).

6 On July 24, 2017, a judgment in favor of FATCO and against New Boca ("FATCO
7 Judgment") was entered in the Debtor's bankruptcy case in the amount of \$370,330.99 plus
8 interest at the federal judgment rate from April 27, 2017.² (ECF No. 960).

9 On or about November 20, 2017, FATCO served a Notice of Intent to Serve Writs of
10 Garnishment on the tenants of the New Boca property ("Notice").³ That Notice was served on
11 the Debtor, New Boca, and US Bank. (ECF No. 970).

12 On or about December 22, 2017, US Bank served an Objection to Writs of Garnishment
13 and Execution Upon Rents. (ECF No. 971).

14 On or about January 4, 2018, FATCO served a Notice of Intent to Serve Writ of
15 Garnishment in Aid of Execution on Wells Fargo. That Notice was served on the Debtor, New
16 Boca, US Bank, and City Bank. (ECF No. 972).

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18 ² On May 24, 2017, in the RA Southeast Adversary, City Bank filed a motion to substitute
19 New Boca as the plaintiff and counterclaim defendant, and to enforce the Plan with respect to the
20 attorney's fees that had been awarded by the USDC. (AECF No. 466). FATCO filed a joinder
21 (AECF No. 472), opposition was filed by the Debtor (AECF No. 473), and City Bank filed a
22 reply. (AECF No. 475). On June 21, 2017, the motion was heard by the court and granted. On
23 July 7, 2017, a written order granting the motion was entered. (AECF No. 494). On July 18,
24 2017, a separate judgment against New Boca in the amount of \$540,088.55 was entered in favor
25 of City Bank. (AECF No. 496). City Bank garnished certain Rents that had been deposited into
26 certain accounts maintained by New Boca at Wells Fargo Bank ("Wells Fargo"). Thereafter, US
27 Bank filed a Petition for Return of Improperly Garnished Property ("Garnishment Return
28 Petition") that was opposed by City Bank. That Garnishment Return Petition was filed by US
Bank as a pleading in the RA Southeast Adversary. (AECF No. 531). On December 12, 2017,
this court entered an order denying the Petition ("Deposit Account Order"). (AECF No. 539).
US Bank appealed that order to the USDC.

³ Attached to the Notice is a copy of written instructions to the constable of the Las Vegas
Township ("Constable") to serve the tenants at the New Boca property with copies of the writs
necessary to obtain the monthly rent checks. Presumably, the checks are payable to New Boca as
the landlord for the shopping center.

1 On January 16, 2018, US Bank filed a Verified Third-Party Claim to Improperly
2 Garnished Property and Petition for Hearing (“US Bank Claim”). (ECF No. 973).⁴ Pursuant to
3 NRS 31.070,⁵ US Bank apparently seeks, *inter alia*, “an order declaring [US Bank] is the rightful
4 and sole owner of the Rents or that it has a superior interest to that of [FATCO], and compelling
5 the Constable to remit the entirety of any Rents taken to [US Bank].” US Bank Claim at 12:19-
6 22.

7 On January 17, 2018, US Bank filed the TRO Application (ECF No. 976) seeking an
8 order to prevent FATCO from garnishing the Rents payable to New Boca pending resolution of
9 the US Bank Claim.⁶ Attached to the TRO Application are copies of various exhibits, two of
10 which are declarations signed under penalty of perjury. One of the declarations is from one of
11 US Bank’s attorneys (“Attorney Declaration”) and the other declaration is from a servicing
12 officer (“Servicing Officer Declaration”) for C-III Asset Management, LLC, which apparently
13 services the underlying loan to New Boca that is held by US Bank.⁷ Attached to these
14 declarations are copies of the following documents: a Deed of Trust and Absolute Assignment of
15 Rents and Leases and Security Agreement (and Fixture Filing) (“Deed of Trust”), an assignment
16 of the same document, a Cash Management Agreement, and a Deposit Account Control
17

18 ⁴ A certificate of service is attached to the US Bank Claim attesting that a copy was
19 electronically served on counsel for the Debtor, RA Southeast, City Bank, and the Office of the
20 United States Trustee, and that a copy was hand delivered to the Constable. The certificate does
21 not attest that the US Bank Claim was served by any method on counsel for New Boca. On
22 January 17, 2018, an amended version of the US Bank Claim was filed. (ECF No. 975). An
equivalent certificate of service is attached to the amended version.

23 ⁵ NRS 31.070 is described by the Nevada Supreme Court as “[t]he third-party claim
24 statute [that] is designed to give a summary remedy to persons . . . who own property in which a
25 judgment creditor can claim no interest.” Elliott v. Denton & Denton, 860 P.2d 725, 726 n.1
(Nev. 1993).

26 ⁶ On January 18, 2018, an amended version of the TRO Application was filed. (ECF No.
977).

27 ⁷ The declaration from the servicing officer has a signature date of November 10, 2017,
28 and apparently is merely a copy of the declaration filed by US Bank in support of its unsuccessful
Garnishment Return Petition.

1 Agreement.⁸

2 On January 25, 2018, orders were entered shortening time so that a hearing on the US
3 Bank Claim and TRO Application could be held on February 6, 2018. (ECF Nos. 982, 983).

4 On February 2, 2018, oppositions to both matters were filed by FATCO. (ECF Nos. 986,
5 987).⁹

6 On February 5, 2018, replies were filed by US Bank. (ECF Nos. 988, 989).

7 **APPLICABLE LEGAL STANDARDS¹⁰**

8 In this circuit, a party seeking temporary injunctive relief must establish four elements:
9 (1) a likelihood of success on the merits of its claim, (2) a likelihood of irreparable harm in the
10 absence of preliminary relief, (3) that the balance of equities tips in the moving party's favor, and
11 (4) that preliminary injunctive relief is in the public interest. See State of Hawaii v. Trump, 878
12 F.3d 662, 683 (9th Cir. 2017), citing Winter v. Natural Resources Defense Council, Inc., 555
13 U.S. 7, 20 (2008). The same standards apply whether the party is seeking a temporary restraining
14 order or a preliminary injunction. See Turner v. Riaz, 2018 WL 360533, at *4 (E.D. Cal. Jan. 10,
15 2018); Bender v. Olivieri, 2011 WL 691317, at *2 (D. Nev. 2011). The burden of persuasion
16 rests with the party seeking preliminary injunctive relief. See In re PTI Holding Corp., 346 B.R.
17 820, 827 (Bankr. D. Nev. 2006). A "clear showing" is required to meet this burden because a
18 preliminary injunction is an extraordinary remedy. See City of Angoon v. Marsh, 749 F.2d 1413,
19 1415 (9th Cir.1984).

20 Monetary injuries generally are not considered to be irreparable harm because there is an
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22 ⁸ The US Bank Claim is accompanied by a verification executed by the same servicing
23 officer. Because the US Bank Claim includes a substantial number of legal conclusions and
24 arguments rather than alleged facts on which the servicing officer might have personal
knowledge, the verification appears to be overreaching.

25 ⁹ Exhibit "4" of FATCO's opposition to the TRO Application consists of an
26 unauthenticated copy of an email message dated January 31, 2018, apparently from FATCO's
27 counsel to the Constable. That email purportedly confirms that the Constable had been
instructed to return to the tenants any Rent checks received from New Boca's tenants.

28 ¹⁰ A separate order with respect to the US Bank Claim has been entered
contemporaneously with the instant Order.

1 adequate remedy at law in the form of damages. See Sampson v. Murray, 415 U.S. 61, 90 (U.S.
2 1974). Damages may not be an adequate remedy, however, where the defendant is dissipating
3 assets or on the verge of insolvency, see generally 11A Charles Alan Wright, Arthur R. Miller &
4 Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2948.1 & n.6 (3rd ed. 2017)
5 (“Wright, Miller & Kane”), or where the plaintiff lacks sufficient resources to await the outcome
6 of trial. See, e.g., Sampson v. Murray, 415 U.S. at 101-102 (Marshall, J., dissenting). Indefinite
7 delays in the exercise of personal rights and privileges also may be irreparable in certain
8 instances. See, e.g., State of Hawaii v. Trump, 878 F.3d at 699 (prolonged separation from
9 family members, diminution of associational benefits).

10 DISCUSSION¹¹

11 At the hearing on the TRO Application, the parties confirmed that two tenants of the
12 shopping center had mailed January rent checks totaling approximately \$46,000 to the Constable,
13 but that the checks had been sent by the Constable back to the tenants, in accordance with
14 instructions by FATCO. See note 9, supra. As a result, no Rent checks claimed by US Bank
15 have been garnished to satisfy the FACTO Judgment.

16 Additionally, no argument was presented at the hearing, nor evidence offered, that any
17 Rents from the shopping center currently are on deposit in any accounts maintained by New Boca
18 at Wells Fargo. Likewise, no argument was made nor evidence presented that FATCO
19 previously garnished any funds deposited with Wells Fargo in satisfaction of the FATCO

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21 ¹¹ As a threshold matter, FATCO argues that an injunction may only be obtained in
22 bankruptcy court by commencement of an adversary proceeding under FRBP 7001(7). US Bank
23 maintains that an adversary proceeding is not required where the responding party has sufficient
24 notice of the matters encompassed by the dispute and is not prejudiced in asserting its legal
25 rights. US Bank relies in part on the language in this court’s decision in In re Swecker, 2016 WL
26 3545052, at *2 (Bankr. D. Nev. Apr. 6, 2016), but that language was dicta in light of the court’s
27 conclusion that the objecting party had waived his procedural objection. As previously
28 mentioned in note 2, supra, the prior Garnishment Return Petition was filed by US Bank as a
pleading in the RA Southeast Adversary. It is not clear why US Bank filed the Garnishment
Return Petition in the RA Southeast Adversary but chose not to do so for the US Bank Claim
when both seek relief based on NRS 31.070. Perhaps it is because the FATCO Judgment is
entered in the bankruptcy case rather than in the RA Southeast Adversary. It is unnecessary to
resolve this procedural issue, however, inasmuch as US Bank has failed to meet its burden of
proof irrespective of the proceeding in which it seeks temporary injunctive relief.

1 Judgment.

2 Under these circumstances, there is no prospect of immediate harm to US Bank from the
3 actions taken by FATCO to satisfy the FATCO Judgment.¹² For that reason, no basis exists for
4 entry of interim injunctive relief by way of a temporary restraining order.¹³

5 In addition to the absence of imminent injury, the type of harm suggested by US Bank
6 also does not constitute irreparable injury. Whatever Rents or rental proceeds, if any, that
7 FATCO obtains from the tenants of the New Boca property are likely to be in the form of money
8 (rather than, e.g., bartered services). At the hearing, US Bank apparently argued that the Rents
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10 ¹² US Bank appealed the Deposit Account Order that had been entered in favor of City
11 Bank. In connection with that proceeding, US Bank asserted in its Garnishment Return Petition
12 that US Bank, rather than New Boca, owns the Rents as a result of language in the Cash
13 Management Agreement. The court concluded that the Cash Management Agreement provides
14 for US Bank to have a security interest in the Rents but does not provide for a transfer of
15 ownership. In connection with the current proceedings against FATCO, US Bank now asserts
16 that it owns the Rents as a result of the assignment language in the Deed of Trust. Presumably,
17 US Bank cannot raise this claim in its appeal of the Deposit Account Order because it never
18 raised the claim before this court. Whether the doctrine of claim preclusion prevents US Bank
19 from asserting this theory against FATCO is not before the court. In any event, it does not appear
20 that FATCO currently seeks to garnish any Rents from the deposit accounts maintained by New
21 Boca at Wells Fargo.

22 ¹³ If FATCO seeks to garnish Rents at a later time and US Bank objects by filing a claim
23 of ownership with the Constable, then FACTO would be required under NRS 31.070(1) to post
24 an undertaking in double the amount for the Constable to proceed. If the undertaking is posted, a
25 hearing before the court with proper jurisdiction must be held expeditiously under NRS
26 31.070(5) to determine title to the Rents. Notice of the hearing must be given to all parties
27 claiming an interest in the Rents. Id.

28 At the hearing on the TRO Application, FATCO did not indicate whether it would
commence additional garnishment efforts in the future and US Bank apparently would like either
an injunction preventing FATCO from doing so, or, a declaration that US Bank, rather than New
Boca, owns the Rents. Even though the US Bank Claim allegedly is filed under NRS 31.070(5),
for some reason US Bank argued that a determination of title to the Rents could proceed without
including New Boca or other parties. This makes little sense inasmuch as the Rent checks
presumably are payable to New Boca and the deposit accounts at Wells Fargo are in New Boca's
name. Moreover, it appears to be expressly contrary to the language of the very statute
authorizing the US Bank Claim to be filed. In connection with the Deposit Account Order, the
record reflects that US Bank did provide notice of the hearing on the Garnishment Return
Petition by at least electronic service to counsel for the Debtor, New Boca, City Bank, RA
Southeast, FATCO, and the Constable. (ECF Nos. 531, 534, 535, 536).

1 constitute a unique source of funds by which New Boca's obligation to US Bank can be satisfied.
2 US Bank seems to ignore, however, that a party requesting interim injunctive relief must provide
3 security to pay the costs and damages sustained by any party later found to have been wrongfully
4 enjoined. See FED.R.CIV.P. 65(c).¹⁴ The very rule on which US Bank bases its TRO Application
5 contemplates that a different source of funds in the form of a security bond, see Wright, Miller &
6 Kane, supra, at § 2954 & n.5, will adequately compensate for monetary injuries sustained as a
7 result of an improvident interim injunction. As the rule makes clear, it is the availability of such
8 funds, not their source, that protects the enjoined party from irreparable injury. Thus, the Rents
9 simply are not a unique source from which any monetary injuries suffered by US Bank may be
10 remedied.

11 The only evidence submitted by US Bank in support of the TRO Application consists of
12 the Attorney Declaration and the Servicing Officer Declaration. Neither declaration, however,
13 suggests that FATCO is dissipating its assets, is on the verge of insolvency, or otherwise would
14 be unable to satisfy a monetary judgment in favor of US Bank. Moreover, there is no basis to
15 conclude that either declarant would have personal knowledge on which to make any such
16 suggestions. Either of the declarants arguably might have personal knowledge of whether US
17 Bank lacks the resources to await the outcome of a trial, but not surprisingly neither declarant
18 suggests that this national banking institution cannot survive a temporary loss of the Rents at
19 issue. Finally, no suggestion is made that any loss of Rents would be indefinite in duration.

20 Under these additional circumstances, US Bank has failed to make any showing, much
21 less a clear showing, of a likelihood of irreparable harm in the absence of temporary injunctive
22 relief. Because of that failure, it is not essential for this court to determine whether US Bank has
23 met its burden with respect to the remaining requirements for injunctive relief.

24 Inasmuch as a separate order has been entered denying the US Bank Claim without
25 prejudice, however, US Bank also has failed to demonstrate a likelihood of success on the merits.

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27 ¹⁴ The requirement to provide security, typically in the form of a bond, does not apply
28 when interim injunctive relief is sought by a bankruptcy trustee, debtor, or debtor in possession.
See FED.R.BANKR.P. 7065.

1 Either one of these failures precludes the entry of interim injunctive relief.

2 **IT IS THEREFORE ORDERED** that the Amended Application for Temporary
3 Restraining Order and Motion for Preliminary Injunction, Docket No. 977, be, and the same
4 hereby is, **DENIED**.

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6 Copies sent to all parties via CM/ECF ELECTRONIC FILING

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