Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
October 17, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: RICHARD A. REED, Debtor.	Case No. 18-17566-MKN Chapter 13
RICHARD A. REED, an individual, Plaintiff, v. SETERUS, INC., a Delaware corporation conducting business in Nevada, et al., Defendants.	Adv. Proc. No. 19-01049-MKN Date: October 2, 2019 Time: 9:30 a.m.

ORDER DENYING MOTION TO STAY CASE PENDING INTERLOCUTORY APPEAL[1]

On October 2, 2019, the court heard arguments on the Motion to Stay Case Pending Interlocutory Appeal ("Stay Motion"), filed by Seterus, Inc. and Federal National Mortgage

[1] In this Order, all references to "AECF No." are to the numbers assigned to the documents filed in this adversary proceeding as they appear on the adversary docket maintained by the clerk of court. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "LR" are to the Local Rules of Bankruptcy Practice for the United States Bankruptcy Code for the District of Nevada.

Association (collectively, the "Defendants"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On May 14, 2019, Richard A. Reed ("Plaintiff") filed his complaint ("Complaint") against Defendants. AECF No. 1.

On July 15, 2019, Defendants filed a motion seeking to dismiss the Complaint under Civil Rule 12(b)(6) and Bankruptcy Rule 7012 ("Dismissal Motion"). AECF No. 13.

On August 16, 2019, the court entered an order denying the Dismissal Motion ("Dismissal Order"). AECF No. 22.

On August 30, 2019, Defendants filed a Notice of Interlocutory Appeal of the Dismissal Order and a Statement of Election to have the interlocutory appeal heard before the United States District Court for the District of Nevada ("District Court"). AECF Nos. 26 and 27. The interlocutory appeal is currently pending before the District Court at Case No. 2:19-cv-01548-JAD ("Appellate Case").

On August 30, 2019, Debtor filed the Stay Motion with this court. AECF No. 29.

On September 5, 2019, Defendants filed a motion in the Appellate Case seeking leave of the District Court to appeal the Dismissal Order as an interlocutory order ("Interlocutory Motion"). Appellate Case, Dkt. No. 5. As of the date of entry of this order, the District Court has neither scheduled a hearing or otherwise ruled on the Interlocutory Motion.

On September 24, 2019, Plaintiff filed an opposition ("Opposition") to the Stay Motion. AECF No. 49.

On September 25, 2019, Defendants filed a reply ("Reply") in support of the Stay Motion. AECF No. 50.

DISCUSSION

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[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in the above-captioned bankruptcy case and adversary proceeding. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

By the Motion, Defendants ask for a court order under Bankruptcy Rule 8007 staying this entire adversary proceeding pending their pursuit of an interlocutory appeal in the District Court. In his Opposition, Plaintiff argues that Defendants have failed to sustain their burden to obtain a stay pending appeal. In their Reply, Defendants counter Plaintiff's Opposition on the merits and on procedural grounds. The court first addresses Defendants' procedural argument.

I. Timeliness of Opposition.

In their Reply, Defendants argue that Plaintiff's Opposition is untimely and therefore "[A]sk that this Court take nothing from the Opposition or take into consideration Debtor's late filing as a basis for its decision, including, but not limited to, the amount of the supersedeas bond to be set." Reply at 2:23-3:1. The court interprets Defendants' request as one seeking to strike the Opposition as untimely filed, which the court denies. Defendants correctly argue that the Opposition was untimely filed on September 24, 2019, i.e., six days after the September 18, 2019, deadline. See LR 9014(d)(1) ("[A]ny opposition to a motion must be filed, and service of the opposition must be completed on the movant, no later than fourteen (14) days preceding the hearing date for the motion."). However, the court has the discretion to allow such late filings, see LR 1001(d), and chooses to exercise this discretion here because of the federal interest in deciding issues on the merits and not on procedural technicalities. See, e.g. Wisdom v. Gugino (In re Wisdom), 770 Fed. Appx. 881, 882 (9th Cir. May 28, 2019) (unpublished) (discussing "the strong policy favoring decisions on the merits" in denying a motion for default judgment); Ledesma Ventures, LLC v. Garlock (In re Garlock), 2017 WL 1089487, at *6 (B.A.P. 9th Cir. March 22, 2017) (same, in the context of reviewing an order dismissing an adversary proceeding for lack of prosecution, but further advising that this federal policy is not, standing alone, outcome determinative).[3]

II. Stay Pending Appeal.

The Ninth Circuit Court of Appeals recently described the standard for a stay pending appeal as follows:

[3] Even if the court struck the Opposition, the court would still conclude that Defendants failed to sustain their burden to obtain a stay pending appeal.

> We decide whether to issue a stay by considering four factors, reiterated by the Supreme Court in *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009):
>
> > (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[4]
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> *Id*. at 434 (quoting *Hilton v. Braunskill)*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). The first two factors "are the most critical," and we only reach the last two "[o]nce an applicant satisfies the first two factors." *Id*. at 434-35, 129 S..Ct. 1749.
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> The requirement that an applicant for a stay make a "strong showing" may be explained at least in part by the fact that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id*. at 433, 129 S.Ct. 1749 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672, 47 S.Ct. 222, 71 L.Ed. 463 (1926)). Indeed "[a] stay is an intrusion into the ordinary processes of administration and judicial review." *Id*. at 427, 129 S.Ct. 1749 (quotation marks omitted). Issuing a stay is therefore "an exercise of judicial discretion" not to be issued "reflexively," but rather based on the circumstances of the particular case. *Id*. at 427, 433, 129 S.Ct. 1749. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34, 129 S.Ct. 1749.

Sierra Club v. Trump, 929 F.3d 670, 687-88 (9th Cir. 2019). See, e.g., In re Fuentes, 2018 WL 921966, at * 1 (Bankr. C.D. Cal. Feb. 15, 2018) (applying the "Nken" factors in connection with a bankruptcy sale).

In their Reply, Defendants concede that they cannot satisfy their burden of making a

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[4] Bankruptcy Rule 8007(a)(1)(A) authorizes a stay of an order pending appeal, while Bankruptcy Rule 8007(e) authorizes the court to suspend the entire case pending appeal. Although Defendants did not expressly ask for relief under Bankruptcy Rule 8007(e), they did ask for a stay as to the entire adversary proceeding, and not just the Dismissal Order. This distinction is without a difference in this matter because the standard for a stay pending appeal appears to be the same under Bankruptcy Rules 8007(a) and (e). See, e.g., 10 COLLIER ON BANKRUPTCY, ¶ 8007.12 n.4 (Richard Levin and Henry J. Sommer, eds., 16th ed.) ("It has been held that the standards governing a stay under subdivision (e) are the same as those governing a stay under subdivision (a). *In re Michigan Produce Haulers, Inc.*, 2015 Bankr. LEXIS 944 (Bankr. W.D. Mich. Mar. 19, 2015)").

strong showing that they are likely to succeed on appeal. Defendants assert as follows:

> First, Debtor tries to argue that a stay is not warranted because an appeal is not meritorious. He then proceeds to argue against the merits of the appeal as to why the appeal is not likely to succeed on the merits. As noted in the instant Motion, the standard is not whether the appeal is likely to win but whether it is meritorious. Here, Defendants have posited that should the District Court grant the relief Defendants seek, the case will be dismissed and there will be no need to proceed with the case, thereby saving time and resources of both this Court and the parties. ***It would be futile to argue the appeal through this briefing because this Court has already determined that the Motion to Dismiss is not meritorious***. That being said, Defendants are entitled to appeal this Court's ruling to the District Court to determine whether that decision was appropriate. Because Defendants have shown that a favorable ruling from the District Court would lead to a dismissal of the present case, the appeal is by definition meritorious.

Reply at 3:7-18 (emphasis added). Defendants essentially contend, contrary to the standard discussed in Sierra Club, that they are entitled to a stay pending appeal notwithstanding the "futility" of arguing to this court why the Dismissal Order was erroneous. Defendants additionally make the conclusory argument that because a potential reversal on appeal will result in dismissal of this case, their request for a stay is "by definition meritorious." In support of this argument, Defendants cite to Leiva-Perez v. Holder, 640 F.3d 962, 968 (9th Cir. 2011) for the proposition that "[r]egardless of how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." Reply at 3 n.7. The fallacy of Defendants' argument, however, is painfully obvious: the first element of the Nken standard would be met for every order or judgment if all the movant had to establish is that it might succeed on appeal.

Notwithstanding Defendants' concession that they cannot satisfy the first factor for a stay pending appeal, the court has considered Defendants' reconstituted arguments that previously were rejected by the Dismissal Order. Defendants argue that the Complaint inappropriately alleges the existence of an agreement to a short payoff that is not mentioned in the Mediation Agreement attached as Exhibit 8 to the Complaint. According to Defendants, these allegations are inadmissible under the parol evidence rule, and the Complaint fails to plead a cause of action

when these inadmissible allegations are disregarded. Defendants further argue that the court erroneously relied on these inadmissible allegations in finding the Mediation Agreement to be ambiguous.

In their Dismissal Motion, however, Defendants themselves established the ambiguity in the Mediation Agreement. They first asserted that the Mediation Agreement was unambiguous:

> Specifically, the Mediation Agreement makes zero mention of any short payoff of the subject loan. Instead, the parties agreed that Plaintiff would relinquish the home when the parties checked off the box that states "Certificate Date: 11/21/2018." This box is found in the section of the Agreement entitled "Relinquish the Home".

Dismissal Motion at 6:21 to 7:3. Defendants then asserted an interpretation of the Mediation Agreement that itself is not contained within its four corners, thereby introducing the ambiguity of which they now complain:

> The parties also agreed in the "comments" section that "Borrower will submit documents through Seterus' counsel. Seterus' counsel will provide documents for retention to Borrower's counsel." Pursuant to the standard as set forth in *Kaldi*, the only logical interpretation of these comments as written is that the parties agreed to continue exploring possible retention, but there was no agreement that any specific retention option, involving a short payoff or otherwise, would in fact materialize, and Plaintiff agreed that the Property could proceed to foreclosure if retention were not possible.

Id. at 7:3-9.[5]

In Defendants' own words, the Mediation Agreement makes "zero mention" of the parties exploring possible retention options or Plaintiff's agreement that Defendants could proceed with foreclosure in the absence of viable retention options. Defendants essentially ask this court, for a second time, to accept their interpretation of what was agreed at the underlying mediation—which is nowhere to be found in the Mediation Agreement—while foreclosing

[5] Defendants' insistence that the Mediation Agreement can mean only one thing is perhaps based on their insistence on using the same legal counsel that participated in the mediation proceeding to defend the Complaint. That counsel, as well as all other participants in the mediation and subsequent events, are likely to be percipient witnesses if the matter proceeds to trial.

Plaintiff from alleging their own interpretation of the Mediation Agreement. The efforts of both parties to allege interpretations not expressed in the four corners of the Mediation Agreement creates the type of ambiguity the parol evidence rule is designed to address:

> The parol evidence rule precludes the admission of extrinsic "evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004). It applies only when the contracting parties agree that the written agreement is the "final statement of the agreement." 11 Richard A. Lord, *Willison on Contracts* § 33:14 (4th ed. 2012). The rule does *not* bar extrinsic evidence that is offered to explain matters on which the contract is *silent* "so long as the evidence does not contradict the [agreement's] terms." *Ringle*, 120 Nev. at 91, 86 P.3d at 1037.

In re Cay Clubs, 340 P.3d 563, 574 (Nev. 2014) (emphasis in original).

Furthermore, Defendants' reconstituted claim that the Complaint contains inadmissible allegations deemed confidential under Nevada Foreclosure Mediation Rule 22 also fails because Defendants' interpretation of the Mediation Agreement, as quoted above, also appears to involve the parties' discussions during the mediation process. As a result, Defendants arguably waived any issues involving confidentiality.[6]

For these reasons, the court concludes that Defendants have failed to satisfy their burden to make any showing, much less a substantial showing, of a likelihood of success on appeal. The court therefore need not, and does not, address the remaining Nken factors.

IT IS THEREFORE ORDERED that the Motion to Stay Case Pending Interlocutory Appeal, Adversary Docket No. 29, be, and the same hereby is, **DENIED**.

IT IS FURTHER ORDERED that Defendants shall file an answer to the Complaint no later than October 31, 2019.

IT IS SO ORDERED.

Copies sent via CM/ECF ELECTRONIC FILING

[6] In connection with the instant Stay Motion, the court makes no finding and reaches no conclusion as to whether Defendants have waived the right to assert any confidentiality concerns under Nevada Foreclosure Mediation Rule 22.

Copies sent via BNC to:

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