

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-1724

IN RE: KIMBALL HILL, INC., *et al.*,

Debtors.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellant,

v.

TRG VENTURE TWO, LLC,

Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:20-cv-06105 — **Ronald A. Guzmán**, *Judge.*

ARGUED OCTOBER 28, 2022 — DECIDED MARCH 3, 2023

Before SCUDDER, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges.*

SCUDDER, *Circuit Judge.* A bankruptcy court found a creditor, Fidelity and Deposit Company, in clear contempt of its plan confirmation order and imposed sizeable sanctions of

\$9.5 million. The district court upheld the decision. Fidelity appeals, seeking to avoid paying the sanctions for its conduct. Fidelity's actions arose out of a commercial transaction following complex bankruptcy proceedings that spurred parallel litigation in state court. The bankruptcy court undertook a careful and detailed analysis in finding Fidelity in contempt of its order and assessing sanctions based on the costs Fidelity's conduct caused a third party to incur. Like the district court, we see no legal or factual error. So we affirm.

I

A

In the early 2000s, Kimball Hill, Inc., entered land development agreements with municipalities in Illinois. As part of these annexation agreements, Kimball Hill contracted separately with Fidelity and Deposit Company as a surety to issue bonds securing performance on the underlying development obligations. The arrangement was straightforward: in the event Kimball Hill failed to develop the properties, the municipalities could draw on Fidelity's surety bonds to cover their losses.

Fidelity negotiated protections of its own. In exchange for securing Kimball Hill's performance, Fidelity required Kimball Hill to indemnify it. This too was a straightforward arrangement: if the municipalities exercised their rights to draw on Fidelity's bonds—due to Kimball Hill's failure to develop the properties—this separate indemnity agreement bound Kimball Hill to reimburse Fidelity for its own losses. Kimball Hill's indemnity obligations to Fidelity lie at the heart of this dispute.

On April 23, 2008, in the wake of the global financial crisis, Kimball Hill filed for Chapter 11 relief in bankruptcy court. At the time of the filing, Kimball Hill had not satisfied its development obligations under the annexation agreements. That reality led the municipalities and Fidelity to file proofs of claim against Kimball Hill in the Chapter 11 proceeding. The municipalities based their claims on a breach of the annexation agreements. For its part, Fidelity rooted its claim in Kimball Hill's potential liability to the municipalities and, by extension, to Fidelity for its expected payout on the surety bonds.

On March 12, 2009, the bankruptcy court entered an order confirming Kimball Hill's plan to liquidate and distribute the estate. Fidelity participated in the confirmation proceedings and voted in favor of the plan. By its terms, the confirmation order released the claims of every party that voted for the plan, including Fidelity.

Upon Kimball Hill's plan confirmation, the bankruptcy court issued an injunction to enforce the plan and confirmation order. The injunction prohibited entities like Fidelity that voted for the plan from seeking payment on the claims that they had agreed to extinguish. The injunction also stated that the bankruptcy court would retain jurisdiction over disputes arising in connection with the interpretation and enforcement of the plan and order.

The liquidation plan created a trust to administer Kimball Hill's estate upon entry of the confirmation order. All of Kimball Hill's assets went into the trust, "free and clear of any and all liens, claims, encumbrances and interests." In 2010 the Kimball Hill Trust sold its development interests in the municipalities' land to TRG Venture Two LLC. TRG believed that

it bought the land free and clear of any claims extinguished by the bankruptcy plan confirmation order.

B

Meanwhile, the municipalities wanted to recover for Kimball Hill's failure to develop the properties. The only way to do so was to draw on the Fidelity bonds, but the bankruptcy court's order enjoined the municipalities from suing Kimball Hill to legally establish its nonperformance. So the municipalities returned to bankruptcy court and moved for relief from the order. The bankruptcy court granted the motion and modified the injunction to allow the municipalities to sue Kimball Hill, but only to "establish liability, if any, against Kimball Hill under the Annexation Agreement for the sole purpose of recovering against the proceeds of the Performance Bonds, if any." By 2013 many municipalities successfully established grounds to recover on the surety bonds and therefore sought payment from Fidelity.

Fidelity's claims against Kimball Hill remained subject to the bankruptcy court's order, however. In one of its claims, Fidelity originally estimated that the bond payouts to the municipalities would total \$43 million. In 2013, following the municipalities' successful liability suits, the Kimball Hill Trust objected to Fidelity's \$43 million claim. The bankruptcy court sustained the objection in part and revised the amount downward to reflect Fidelity's aggregate payouts to the municipalities at that time. The bankruptcy court also reserved Fidelity's right to seek upward readjustments to reflect future payouts, should additional municipalities draw on Fidelity's bonds. But outside the bankruptcy proceedings, Fidelity's right to recover for its indemnity claims remained extinguished by the plan confirmation order.

C

Around the same time, state court litigation was underway. The municipalities sued Fidelity in state court to collect on the surety bonds. In each state court action, Fidelity reacted by interpleading TRG on the view that it could enforce Kimball Hill's pre-petition indemnity obligations against TRG as Kimball Hill's successor. TRG successfully moved to dismiss each of Fidelity's interpleader claims, but Fidelity filed subsequent appeals that brought TRG back into the state court litigation.

TRG believed Fidelity's state court actions were pursued both in bad faith and in violation of Fidelity's agreement to extinguish certain claims under the Chapter 11 confirmation order. So TRG turned to the bankruptcy court as a new avenue for relief from Fidelity's claims that TRG must provide indemnity for the surety payouts to the municipalities. In July 2016 TRG asked the bankruptcy court to enforce the Kimball Hill plan confirmation order and related injunction against Fidelity. TRG argued that Fidelity's pre-petition claims against the Kimball Hill Trust—and by extension, TRG—had been extinguished upon plan confirmation. TRG asked the court not only to order Fidelity to dismiss the state court claims, but also to sanction Fidelity for its knowing and intentional violation of the confirmation order.

D

In 2017 the bankruptcy court granted TRG's motion and held Fidelity in contempt of the plan confirmation order. The bankruptcy court concluded that the confirmation order extinguished Kimball Hill's pre-petition duty to indemnify Fidelity. The court also determined that sanctions were

warranted because Fidelity knowingly voted to extinguish these claims but then turned around and pursued them anyway against TRG. After discovery and a bench trial to assess damages, the bankruptcy court awarded \$9.5 million to TRG, which included the costs TRG incurred defending itself against Fidelity's state court claims seeking indemnity.

Fidelity appealed to the district court. In 2019, while Fidelity's appeal was pending, the Supreme Court decided *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), which changed the standard for imposing sanctions and finding parties in contempt of bankruptcy plan confirmation orders. The district court remanded to allow the bankruptcy court to reevaluate sanctions under *Taggart's* objective standard. On remand the bankruptcy court reinstated its original contempt findings and reimposed the \$9.5 million in sanctions against Fidelity. Fidelity again appealed, and the district court affirmed.

Fidelity now seeks our review.

II

A

Fidelity first contends that the bankruptcy court lacked jurisdiction to interpret and enforce Kimball Hill's plan confirmation order. Not so. "[A] bankruptcy court," the Supreme Court has explained, "plainly [has] jurisdiction to interpret and enforce its own prior orders," particularly when the court has "explicitly retained jurisdiction to enforce its injunctions" as part of the order. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934)); see also 1 Collier on Bankruptcy ¶ 3.02[7] (16th ed. 2022). This residual jurisdictional authority stems from the Bankruptcy Code, which confers subject matter jurisdiction

on claims “arising under” and “related to” bankruptcy proceedings. 28 U.S.C. § 1334(b). Congress’s grant of jurisdiction extends to creditor conduct within the scope of a plan confirmation order.

This case is a textbook example. TRG turned to the bankruptcy court to enjoin Fidelity—a creditor of Kimball Hill—from pursuing claims extinguished by the plan confirmation order. Indeed, when TRG initially filed the motion in 2016, the Kimball Hill Trust had not yet finished distributing assets and resolving outstanding claims, including Fidelity’s claims for the amount the municipalities had so far drawn from Fidelity’s bonds. The bankruptcy court retained the authority to determine whether Fidelity’s claims against TRG were the same as those Fidelity sought to recover from the Kimball Hill Trust.

In contending otherwise, Fidelity conflates a jurisdictional question with a merits question. The former asks only whether the bankruptcy court can interpret its own plan confirmation order to decide whether Fidelity’s claim against TRG is one extinguished by the order. The answer is clearly yes.

B

That takes us to the merits. Fidelity insists the bankruptcy court incorrectly applied *Taggart’s* objective standard in reinstating its contempt order and sanctions. Here, too, we disagree.

Having taken our own fresh look at *Taggart’s* objective standard as it applies to Fidelity’s conduct, we see no errors with the bankruptcy court’s decision. The bankruptcy court recognized that TRG, as the moving party, bore the burden of

showing that there was “no objectively reasonable basis for concluding that [Fidelity]’s conduct might be lawful under the [] order.” 139 S. Ct. at 1801. When TRG brought evidence of Fidelity’s “record of continuing and persistent violations” of the plan confirmation order, the bankruptcy court stood on solid ground in finding that the firm met its burden under *Taggart*. *Id.* at 1802 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–93 (1949)). The bankruptcy court was then rightly “justified [in] placing ‘the burden of any uncertainty in the decree ... on [the] shoulders’ of [Fidelity].” *Id.* (second and third alterations in original) (quoting *McComb*, 336 U.S. at 192–93).

Fidelity begs to differ by suggesting that TRG was not held to its burden and instead that the bankruptcy court impermissibly imposed a burden of proof on Fidelity. Once again, we cannot agree. We see nothing indicating that the bankruptcy court shifted the burden to Fidelity. To the contrary, the bankruptcy court provided Fidelity a full and fair opportunity to argue that the plan confirmation order was ambiguous and did not extinguish the indemnity claim Fidelity later pursued against TRG. That the bankruptcy court rejected Fidelity’s argument on the merits does not mean that the court failed to follow *Taggart*’s objective standard. We see just the opposite: the bankruptcy court understood and applied *Taggart*’s teachings.

We also agree with the bankruptcy court’s conclusion that there is no “fair ground of doubt” that Fidelity’s actions amounted to a flagrant violation of the agreed-to terms of Kimball Hill’s plan confirmation order. Remember what happened. Fidelity sought to recover pre-petition indemnity liabilities that it believed TRG assumed as the purchaser of

Kimball Hill's development properties. In doing so, however, Fidelity ignored the confirmation order, which, by its terms, extinguished any rights to recover those liabilities outside of the bankruptcy proceedings. Pre-petition claims extinguished upon plan confirmation do not spring back into existence upon post-confirmation asset sales. Indeed, the reason for a successor-in-interest like TRG to enter such a transaction is because the Kimball Hill Trust's assets are being sold "free and clear" of any pre-petition liabilities.

Fidelity's contentions to the contrary border on frivolous. The bankruptcy court's plan confirmation order—that Fidelity voluntarily reviewed and approved—was clear and precise: Kimball Hill's successors-in-interest were released parties under the plan. This is not a case of unknown third-party tort victims that were not part of the plan confirmation. See, *e.g.*, *Zerand-Bernal Grp., Inc., v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). The plan order provided that future purchasers of the Kimball Hill Trust's assets were expressly contemplated and released from pre-petition creditors' claims against Kimball Hill's estate.

Fidelity believes that it has a right to claim indemnity costs from TRG because the municipalities have been able to enforce their development agreements against TRG. But TRG's obligations to the municipalities are separate from Fidelity's pre-petition indemnity claims. Fidelity fails to recognize the difference between property-based and entity-based claims. As covenants that run with the land, Kimball Hill's development obligations were part and parcel of the land sale to TRG. That is why the bankruptcy court determined that Kimball Hill's development obligations survived the plan confirmation order. But Kimball Hill's indemnity obligations to

Fidelity are entity-based: Kimball Hill agreed to indemnify Fidelity in the event the latter paid the surety bonds to the municipalities. The fact that the indemnity obligations arose from the land development deal does not change that fundamental nature of Fidelity's claims.

Fidelity has lost sight of the bigger picture. The firm refuses to accept the consequences of the intervening bankruptcy proceedings on its agreement with Kimball Hill—that its pre-petition claims stemming from Kimball Hill's pre-petition acts are extinguished. Our decision says nothing, however, of Fidelity's ability to pursue future claims arising from post-petition acts. For instance, if TRG violated some new, post-petition obligation to Fidelity that arose after Kimball Hill's Chapter 11 petition, Fidelity could seek to vindicate that right. But that is not what happened here.

Given such a knowing, intentional violation of the plan order, we cannot conclude that Fidelity had an objectively reasonable basis to pursue its pre-petition claims against TRG. The bankruptcy court did not err by finding Fidelity in contempt and imposing \$9.5 million in sanctions.

C

In its final effort to avoid paying the sanctions, Fidelity argues that the district court erred in awarding sanctions to TRG because Fidelity did not proximately cause TRG's state court litigation fees. Fidelity instead suggests that TRG, because it would have had to defend itself against separate claims brought by the municipalities, did not sustain harm warranting sanctions against Fidelity.

Fidelity asks us to ignore reality. The link is crystal clear between Fidelity's conduct and TRG's litigation costs: TRG

was not a party to the state court litigation until Fidelity interpleaded TRG. And the municipalities that sued TRG after the interpleader testified that Fidelity's conduct drove them to sue. Further, the claims at issue were different—Fidelity raised indemnity issues and the municipalities raised contract issues. Fidelity may be right that TRG incurred additional costs while defending itself against the municipalities' separate contract claims, but that says nothing of Fidelity's independent indemnity claims that TRG also had to defend against.

The bankruptcy court correctly examined TRG's evidence of its costs arising directly from its efforts to fend off Fidelity's indemnity claims. The bankruptcy court then calculated actual damages incurred in, related to, or as a direct result of state court lawsuits; the costs incurred in maintaining the properties during the state court litigation; and the lost value due to TRG's delayed ability to sell the properties. The court made no errors in assessing TRG's costs at \$9.5 million.

For these reasons, we AFFIRM.