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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re: Allstate Life Insurance Company
Litigation

Lead Case No. CV-09-08162-PCT-GMS

Consolidated with:
No. CV-09-8174-PCT-GMS

ORDER

Third-party Defendant/Cross-Defendant/Cross-Claimant Wells Fargo Bank, NA (Trustee) and Plaintiff/Counter-Defendant Allstate Life Insurance Company have moved for summary judgment¹ on the counterclaim and third-party claim asserted against them by Defendant/Third-party Plaintiff/Cross-Claimant Town of Prescott Valley. (Doc. 696.) Because this Motion raises issues distinct from those in other motions for summary judgment in this case, the Court has filed this separate Order. The Motion is denied as moot in part and denied in part for the reasons specified below.

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¹ Allstate and Wells Fargo have filed multiple motions for summary judgment in direct violation of the Case Management Order (CMO), which states: “No party shall file more than one motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure unless permission is first obtained, by joint telephone call, from the Court.” (Doc. 257 ¶ 7(b).) Both Parties have acknowledged that they did not receive permission to file multiple motions for summary judgment. (Doc. 935 at 2.). While not generally inclined to do so, the Court will rule on the multiple issues because the parties have spent time briefing them, the Court has spent time reviewing them, and the ultimate fact finder and the parties have an interest in refining the disputes in this case.

1 **BACKGROUND**

2 The facts pertaining to this securities litigation are set forth in earlier orders.
3 (Docs. 212, 655.) In short, this litigation was generated by a bond offering to finance the
4 construction of an Event Center in the Town of Prescott Valley. This Order addresses two
5 claims asserted by the Town. First, the Town asserted a third-party claim against Wells
6 Fargo, the Trustee of the Independent Development Authority of the County of Yavapai
7 (Issuer) “for such portions of the claims against the Town that arise from or are related to
8 the Town’s September 2009 payment under the Development Agreement and/or to such
9 other debts and service amounts not paid to Bond holders notwithstanding future
10 payments by the Town under the Development Agreement.” (Doc. 95 ¶¶ 50–51.) Second,
11 the Town counterclaimed against Allstate for intentional interference with contractual
12 relations. Both claims rely on the same basic premise, namely that Allstate directed Wells
13 Fargo to use certain revenues set apart for debt service to instead fund this litigation.
14 Three agreements are central to the Town’s claims.

15 On May 12, 2005, the Town entered into the Pre-Annexation Development
16 Agreement with Prescott Valley Event Center LLC (Borrower), among other parties.
17 (Doc. 697 ¶ 1; Doc. 869 ¶ 1.) The Trustee is not a party to the Development Agreement.
18 (Doc. 697 ¶ 3; Doc. 869 ¶ 3.) The basic purpose of the Development Agreement was to
19 chart the planning, funding, and construction of an Event Center. (Doc. 705-1, Ex. 1 at
20 KUTAK001092–96.) The Development Agreement set forth a number of provisions that
21 described how certain revenues would be used to service the debt raised by the Event
22 Center financing. Specifically, the Borrower agreed that the operating revenue of the
23 Event Center would be used, after deducting operating expenses and fees, to “pay all
24 current debt service on the [Event Center] financing.” (*Id.* at KUTAK001105.) If the
25 operating revenue proved insufficient to pay all current debt service, the Borrower agreed
26 that “any shortfall shall be paid first out of the funds held in the Fain Escrow Account,
27 then from the Lockbox Account, and then from the Town Escrow Account.” (*Id.*)

28 The Fain Escrow Account and Lockbox Account contained certain funds (TPT

1 Revenues) from the Town, and according to the Development Agreement, those funds
2 could be used to pay any shortfall in the current debt service on the Event Center
3 financing. (*Id.* at KUTAK001103.) The Town Escrow Account also contained TPT
4 Revenues, and the provision that established this Account also specified that “[t]he funds
5 in the Town Escrow Account shall be used to pay debt service on the [Event Center]
6 financing if the Net Operating Revenues from the [Event Center], any funds in the Fain
7 Escrow Account, and any funds in the Lockbox Account are insufficient to provide funds
8 to pay debt service in any month.” (*Id.* at KUTAK001112.) Finally, the Town agreed to
9 establish a fourth backup fund that consisted of additional TPT Revenues from a
10 Secondary Credit Support Area, to make up a certain percentage of any remaining
11 “deficiency” in meeting debt service. (*Id.* at KUTAK001113.)

12 The Trustee and the Issuer entered into an Indenture of Trust Agreement on
13 November 1, 2005. (Doc. 697 ¶ 4; Doc. 869 ¶ 4.) The Town is not a party to the
14 Indenture. (Doc. 697 ¶ 5; Doc. 869 ¶ 5.) Article VI of the Indenture pledged the operating
15 income of the Event Center and any TPT Revenues received to pay debt service on the
16 Bonds. (Doc. 705-2, Ex. 2 at KUTAK000084–90.) The Trustee agreed to establish a
17 Revenue Fund to hold operating income and TPT Revenues and then to disburse those
18 funds in a specific sequence to bondholders, certain expenses and fees, and then reserve
19 funds. (*Id.*) The Indenture expressly incorporated those provisions of the Development
20 Agreement that specified how, when, and for what purposes the Trustee could access and
21 use the Lockbox Account, Fain Escrow Account, Town Escrow Account, and funds from
22 the Secondary Credit Support Areas. (*Id.* at KUTAK000089–90.)

23 The Development Agreement allowed the Borrower, without prior consent or
24 approval, “to assign to any lender providing financing to the [Borrower] and/or with
25 respect to the [Event Center], as security for such financing, the rights of the [Borrower]
26 under this Agreement.” (Doc. 705-1, Ex. 1 at KUTAK001119–20.) Pursuant to that
27 provision, the Borrower and Trustee executed an Assignment Agreement on December 1,
28 2005. (Doc. 697 ¶ 6; Doc. 860 ¶ 6.) The Town is not a party to the Assignment

1 Agreement. (Doc. 697 ¶ 8; Doc. 869 ¶ 8.) The Borrower specifically “assign[ed],
2 transfer[ed] and convey[ed] unto the [Trustee], its successors and assigns, as security for
3 payment of the Bonds and the payment, performance and observance of all of the
4 [Borrower]’s duties and obligations with respect thereto, all of the [Borrower]’s rights in
5 and to the Pledged TPTax Revenues and the receipt thereof under the Development
6 Agreement.” (Doc. 705-3, Ex. 3 at KUTAK000138.) The Assignment Agreement
7 specifically provided, however, that the Trustee “shall not be obligated to perform or
8 discharge . . . any obligation, duty or liability under the Development Agreement, or
9 under or by reason of this Assignment Agreement, and all obligations, duties or liabilities
10 of the [Borrower] arising out of or in respect to the Development Agreement herein
11 assigned shall be the sole responsibility of the [Borrower].” (*Id.* at KUTAK000139.)

12 In October 2009, Allstate, a bondholder, instructed Wells Fargo to use available
13 revenues, including TPT Revenues, to pay the legal fees they expected to incur in this
14 action instead of making payment of debt service on the Bonds. (Doc. 875-3, Exs. 25–
15 28.) The Town subsequently brought claims against both Allstate and the Trustee.

16 DISCUSSION

17 I. LEGAL STANDARD

18 Summary judgment is appropriate if the evidence, viewed in the light most
19 favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to
20 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
21 P. 56(a). Substantive law determines which facts are material and “[o]nly disputes over
22 facts that might affect the outcome of the suit under the governing law will properly
23 preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
24 248 (1986). “A fact issue is genuine ‘if the evidence is such that a reasonable jury could
25 return a verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d
26 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, the nonmoving
27 party must show that the genuine factual issues “‘can be resolved only by a finder of fact
28 because they may reasonably be resolved in favor of either party.’” *Cal. Architectural*

1 *Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)
2 (quoting *Anderson*, 477 U.S. at 250). Because “[c]redibility determinations, the weighing
3 of the evidence, and the drawing of legitimate inferences from the facts are jury
4 functions, not those of a judge, . . . [t]he evidence of the nonmovant is to be believed, and
5 all justifiable inferences are to be drawn in his favor” at the summary judgment stage.
6 *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59
7 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“Issues of credibility,
8 including questions of intent, should be left to the jury.”) (citations omitted).

9 Furthermore, the party opposing summary judgment “may not rest upon the mere
10 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts
11 showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see *Matsushita Elec.*
12 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Brinson v. Linda Rose*
13 *Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *Taylor v. List*, 880 F.2d 1040, 1045
14 (9th Cir. 1989); see also L.R.Civ. 1.10(l)(1) (“Any party opposing a motion for summary
15 judgment must . . . set[] forth the specific facts, which the opposing party asserts,
16 including those facts which establish a genuine issue of material fact precluding summary
17 judgment in favor of the moving party.”).

18 **II. ANALYSIS**

19 Although Allstate and the Trustee have jointly moved for summary judgment, the
20 Town’s claims against them are not identical and will be considered separately.

21 **A. Third-party Claim**

22 The Town’s claim against the Trustee is a third-party claim under Rule 14(a)(1) of
23 the Federal Rules of Civil Procedure. Rule 14(a)(1) permits “[a] defending party [the
24 Town]. . . [to] serve a summons and complaint on a nonparty [the Trustee] who is or may
25 be liable to it for all or part of the claim against it.”

26 The Town’s Third-party Complaint does not specify the theory of liability that the
27 Town invokes. Under the heading “Third-party Claim against the Trustee,” the Town
28 alleges only that “[t]he Trustee is or may be liable to the Town for such portions of the

1 claims against the Town that arise from or are related to the Town's September 2009
2 payment under the Development Agreement and/or to such other debts and service
3 amounts not paid to Bond holders notwithstanding future payments by the Town under
4 the Development Agreement." (Doc. 95 at 36.) In the body of the Third-Party Complaint,
5 the Town alleges that "[t]he Trustee, as assignee of the rights of other parties to receive
6 payments from the Town under the Development Agreement, is obligated to handle and
7 disburse these amounts in accordance with that Agreement." (*Id.* at 30.) Thus, the most
8 likely interpretation of the Town's claim against the Trustee is that it sounds in contract.
9 Nevertheless, during the oral argument held before this Court on September 4, 2013, the
10 Town conceded that it had no contract claim against the Trustee, and rather that its claim
11 was one for common law indemnification. (Doc. 945 at 23:18–24:10.) The Town's claim
12 for common law indemnification is the subject of a different Motion for Summary
13 Judgment. (Doc. 691.) That Motion has been denied in a separate Order filed
14 concurrently with this one. To the extent that the Town once alleged any claim against
15 the Trustee sounding in contract, the Court takes its statements during argument as a
16 withdrawal of such claims. Thus, because those claims are no longer in this lawsuit, the
17 Trustee's Motion regarding those claims is denied as moot.

18 **B. Tortious Interference**

19 The Town's counterclaim against Allstate, however, is for tortious interference.
20 The Town claims that Allstate's instruction to the Trustee to divert the Town's TPT
21 Revenue payments from debt service to the payment of legal fees was in violation of the
22 Town's rights under the Development Agreement. Allstate is unable to show otherwise.

23 To successfully state a claim for intentional interference with contractual relations,
24 the Town must show:

25 (1) the existence of a valid contractual relationship; (2) knowledge of the
26 relationship on the part of [Allstate]; (3) intentional interference inducing or
27 causing a breach; (4) resultant damage to [the Town]; and (5) that [Allstate]
acted improperly.

28 *Snow v. Western Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730 P.2d 204, 211 (1986).

1 Thus, “[t]ort liability may be imposed upon a defendant who intentionally and improperly
2 interferes with the plaintiff’s rights under a contract with another if the interference
3 causes the plaintiff to lose a right under the contract.” *Id.* at 34.

4 The Development Agreement is clear that the TPT Revenues are intended solely to
5 “pay all current debt service on the PVCEC Financing.” (Doc. 705-1, Ex. 1 at
6 KUTAK1105.) Sections 4.1.4, 4.2.7.2, 4.3.7.4, and 4.3.7.6 of the Development
7 Agreement, among others, establish that limited purpose. Each time the Development
8 Agreement describes an account that contains TPT Revenues, it states that the funds
9 “shall be used” to pay debt service. (Doc. 705-1, Ex. 1 at KUTAK001103,
10 KUTAK001105, KUTAK001112–13.) The “shall be used” language appears in sections
11 entitled “Obligations of Fain,” “Obligations of GED and Developer [Borrower],” and
12 “Obligations of the Town.” (*Id.*) Each time the language is used, it is in the context of
13 describing the purpose of the TPT Revenues. For example, in § 4.3.7.2 the Town agrees
14 to “establish a separate account” and “credit quarterly to the . . . Account” a certain
15 amount of TPT Revenues, but that same section states that the funds from that account
16 “shall be used to pay debt service on the [Event Center] financing” under the conditions
17 discussed above. (*Id.* at KUTAK001112.) Every time the Agreement discusses accessing
18 the TPT Revenues, it recites that those revenues are to be used for debt service. Thus the
19 Town had the obligation to make those funds available in the specific accounts, but the
20 Borrower had the right to access those funds only to service the debt and only if the
21 operating income was insufficient. Consequently, the Development Agreement
22 apparently conferred a right to access the TPT Revenues that was conditional on the
23 promise to use those funds only to service the bond debt if other funds proved
24 insufficient, and not a freewheeling right to the TPT Revenues and a separate obligation
25 to use those revenues to service the bond debt. Use of the TPT Revenues for any other
26 purpose arguably exceeds the scope of the right granted and would constitute a breach of
27 the Development Agreement.

28 Even if the Trustee is not independently liable for the Borrower’s obligations

1 under the Development Agreement, the Borrower assigned its right to access the TPT
2 Funds under the Development Agreement to the Trustee. Thus, the conditions for which
3 the Trustee could access the funds were defined by the Development Agreement. Indeed,
4 the Assignment Agreement states that the Borrower “assign[ed], transfer[ed] and
5 convey[ed] unto the [the Trustee] . . . all of the [Borrower]’s rights in and to the Pledged
6 TPTax Revenues and the receipt thereof under the Development Agreement.” (Doc. 705-
7 3, Ex. 3 at KUTAK000138.) Arguably, the Indenture also permitted the Trustee to use the
8 TPT Revenues only for debt service if operating income was lacking.

9 It is axiomatic that a party can assign no more than the contractual rights it has.
10 *Stephens v. Textron, Inc.*, 619 P.2d 736, 739 (Ariz. 1980); *Bus. Fin. Servs., Inc. v. Butler*
11 *& Booth Dev. Co.*, 711 P.2d 649, 651 (Ariz. Ct. App. 1985); Restatement (Second) of
12 Contracts § 336, cmt b. Because the Borrower had no right to use the TPT Revenues for
13 anything other than bond service, the Trustee had no right to use the TPT Revenues for
14 anything other than bond service. Accordingly, the Trustee had no right to use the TPT
15 Revenues to pay legal fees under the Assignment Agreement and quite possibly the
16 Indenture. Its obligation was to exercise only those rights it received. Consequently,
17 Allstate arguably induced a breach of the Development Agreement between the Town
18 and the Borrower by inducing the Trustee to use the TPT Revenues to pay legal fees.

19 Although the Trustee was not in privity with the Town under the Development
20 Agreement, as discussed above, that fact does not foreclose a tortious interference claim.
21 A claim may lie where the interference (here, the instruction by Allstate to Wells Fargo)
22 has some effect on the Town's rights in the contract, even if the interference was indirect,
23 i.e., not with a party to the contract that was allegedly breached. The Arizona Supreme
24 Court has emphasized that there are a number of ways to show interference:

25 “There is no technical requirement as to the kind of conduct that may result
26 in interference with the third party's performance of the contract.” . . .
27 While the paradigm case of tortious interference with contract may be that
28 of a tortfeasor who induces breach by enticing the contracting party not to
perform or by preventing or disabling that party from being able to

1 perform, the Restatement emphasizes that liability attaches to any
2 intentional interference, whether by inducement or otherwise. “The
3 essential thing is the intent to cause the result.”

4 *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395*
5 *Pension Trust Fund*, 201 Ariz. 474, 494, 38 P.3d 12, 32 (2002) (quoting Restatement
6 (Second) of Torts § 766 cmts. k, h) (internal citations omitted). Thus Allstate’s
7 instruction to the Trustee may have resulted in the breach of the borrower’s obligation
8 under the Development Agreement to use the TPT Revenues solely for debt service.
9 Despite Allstate’s assertion to the contrary, the fact that the Trustee was not a party to the
10 Development Agreement is not fatal. The Town’s claim is that Allstate’s actions caused a
11 breach of the Development Agreement and there is sufficient evidence of that fact to
12 allow the claim to proceed.

13 Allstate has also claimed there is insufficient evidence of damages to allow the
14 Town’s claim to go to a jury. Damages are an essential component of a tortious
15 interference claim. *See Snow*, 152 Ariz. at 33. The Trustee and Allstate attempt to negate
16 any damages by making a “binding, unequivocal judicial admission that the Town has
17 been and will be given credit for all TPT Revenue payments it has made in the past and
18 will make in the future and that Plaintiffs are not seeking damages for those payments.”
19 (Doc. 696 at 6.) In other words, the Town will not be liable to either Allstate or the
20 bondholders the Trustee represents for TPT revenues it has paid with the intent that those
21 revenues be used for bond service, but which the Trustee has instead used to pay the legal
22 fees for itself and Allstate.

23 Even if Allstate and the Trustee credit the Town with whatever TPT Revenues the
24 Town has paid,² that may not resolve all the consequences to the Town of Allstate’s

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26 ² The Town disputes whether Allstate and Wells Fargo have properly credited the
27 Town with the TPT Revenues it has paid. (Doc. 871 ¶¶ 29–39.) That dispute goes to the
28 amount of the credit the Town should receive in the event it is found liable to Allstate or
Wells Fargo, not whether the Town has suffered damage as a result of the actions of
Allstate. Allstate has expressly claimed that the Town will not be required to pay
anything that it has already paid as TPT Revenues.

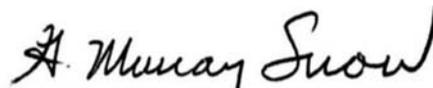
1 direction to the Trustee to use TPT Revenues for legal expenses rather than paying the
2 bondholders. There are genuine factual issues that remain as to how the Town may have
3 been damaged by that alleged interference, including whether that instruction had a role
4 in Fitch's downgrade of the bonds, the resulting change in the value of the Bonds, and the
5 resulting initiation of any claims against the Town in this lawsuit. In light of these factual
6 uncertainties, summary judgment is inappropriate.

7 **CONCLUSION**

8 The Town has withdrawn any claims it has against the Trustee for third-party
9 breach of contract. The counterclaim against Allstate for tortious interference, however,
10 remains.

11 **IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Summary Judgment
12 is **denied as moot in part and denied in part**. (Doc. 696.) Summary judgment is denied
13 on the Town's counterclaim against Allstate for tortious interference. Because the Town
14 has withdrawn its third-party claim against Wells Fargo, the Motion on that ground is
15 denied as moot.

16 Dated this 13th day of September, 2013.

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19 _____
20 |G. Murray Snow
21 United States District Judge
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