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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 BLAIR WALLACE,
11 Appellant,
12 v.
13 WRIGHT GRANDCHILDREN, LP;
14 MICHAEL WRIGHT,
15 Appellees.

No. 2:14-CV-00576-GEB
Adv. Proc. 08-02364-B
Bankruptcy No. 08-29045-B-7
BAP No. EC-14-1060

APPEAL FROM BANKRUPTCY COURT

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18 Appellant Wallace ("Wallace"), as Plaintiff Spiegel's
19 ("Spiegel") successor in interest, appeals the Bankruptcy Court's
20 order that granted Appellees Wright Grandchildren L.P.'s ("WG")
21 and Michael Wright's ("Wright") declaratory relief and judicial
22 foreclosure claims, and denied Plaintiff Spiegel's counterclaim
23 for breach of contract. For the reasons set forth below, the
24 Bankruptcy Court's decision is AFFIRMED.

25 **I. STANDARD OF REVIEW**

26 A district court reviews a Bankruptcy Court's
27 "[f]indings of fact . . . under the clearly erroneous standard of
28 review and legal conclusions are reviewed de novo." In re

1 Mortgage Store, Inc., ___F.3d___, 2014 WL 6844630, at *2 (9th
2 Cir. Dec. 5, 2014).

3 "A finding is 'clearly erroneous' when
4 although there is evidence to support it, the
5 reviewing court on the entire evidence is
6 left with the definite and firm conviction
7 that a mistake has been committed." This
8 standard plainly does not entitle a reviewing
9 court to reverse the finding of the trier of
10 fact simply because it is convinced that it
11 would have decided the case differently.

12 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)
13 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395
14 (1948)).

15 **II. FACTUAL BACKGROUND AND PROCDURAL HISTORY**

16 Wallace's predecessor in interest and wife, Spiegel,
17 owned two proprietities in Placer County, California: an 80-acre
18 waterski lake and fish farm (the "Improved Parcel") and an 80-
19 acre unimproved parcel (the "Unimproved Parcel") adjacent to the
20 Improved Parcel. On June 1, 2006, Spiegel used the Parcels as
21 security for a \$1.7 million loan from Wright, who was acting as
22 WG's managing partner. The agreement included the following
23 release clause in the event that Spiegel sold the Improved
24 Parcel:

25 Beneficiary agrees to release . . . [the
26 Improved Parcel] provided that the loan to
27 value ratio of . . . [the Unimproved Parcel]
28 does not exceed 50% of the existing loan
balance. . . . If [the Improved Parcel] . . .
sells, the maximum dollar amount the Borrower
has to pay is \$150,000, but in no event more
than is required to reduce the loan to value
ratio to less than 50% on [the Unimproved
Parcel]. (SRE 10.)

29 In January 2008, Spiegel defaulted on the Note. At
30 approximately the same time, she entered talks with a third party

1 about selling a portion of the Improved Parcel. Spiegel
2 communicated with Wright about the potential sale in February and
3 March 2008 through both her attorney and Wallace. In March 2008,
4 Spiegel's counsel, Wallace, and Wright had an in-person meeting
5 about the Improved Parcel. The parties dispute whether during
6 this meeting Wright was offered \$150,000 in exchange for
7 releasing the Improved Property.

8 On April 2, 2008, Spiegel executed a final sales
9 agreement with a third party selling a one-half interest in the
10 Improved Property for \$1.5 million. Spiegel's attorney notified
11 Wright's attorney of the sale on April 8. Wright and WG then made
12 a demand for the full amount owed on the loan, in light of
13 Spiegel's default, and filed a Complaint in state court seeking
14 judicial foreclosure and declaratory relief. Spiegel filed a
15 cross complaint for breach of contract in which Spiegel alleged
16 Wright and WG failed to perform under the release clause of the
17 agreement. Spiegel eventually filed for bankruptcy, following
18 which the case was removed to Bankruptcy Court. The parties
19 consented to the Bankruptcy Court's jurisdiction.

20 A trial was conducted in May 2010. The disputed trial
21 issue was the interpretation of the release clause. Wright and WG
22 argued the release clause did not require the release of the
23 Improved Property unless Spiegel agreed to maintain the loan to
24 value ratio on the Unimproved Property. Spiegel argued she was
25 not required to maintain the loan to value ratio on the
26 Unimproved Property so long as she tendered \$150,000 to Wright.
27 The Bankruptcy Court ruled in favor of Wright and WG. Wallace
28 then purchased Spiegel's appeal rights from her bankruptcy estate

1 on November 23, 2010.

2 Wallace appealed, and the Bankruptcy Court's ruling was
3 reversed by the Ninth Circuit. The Ninth Circuit held that the
4 terms of the release clause were unambiguous and Spiegel had the
5 right to release the Improved Parcel in the event of a sale of
6 that property by offering to pay the maximum fixed payment of
7 \$150,000 with no requirement to "maintain" the loan to value
8 ratio on the Unimproved Property.

9 On remand, the Bankruptcy Court conducted a second
10 trial, during which it granted Wright and WG's request for
11 judicial foreclosure and declaratory relief, and denied Spiegel's
12 cross-complaint for breach of contract, finding that no tender
13 had ever been made.

14 The court entered its findings of fact orally, stating
15 in part:

16 I don't think there was any proof, per se,
17 that [Wallace] had enough money at any given
time to tender \$150,000.

18

19 I don't think there was the money available
20 at any time to perform, and a tender does
21 require, as I understand it, a present
22 ability to perform. A tender is ineffective
23 if the party making the offer is actually
24 unwilling or unable to perform at the time of
25 the tender. Thus, when the offer is to pay
26 money, it must appear that the offeror has
the money to pay, and the tender is
ineffective if the offeror doesn't have the
present ability to perform the tender if it
is accepted. Well, I didn't have any proof
that the money was available, and as I said,
I had some doubt about what Mr. Wallace was
testifying to.

27 (RT-2, Vol. 2, pg. 120, 124.)
28

III. DISCUSSION

A. Ability to Perform

Wallace argues that from February 12, 2008, through March 24, 2008, Spiegel made four valid offers to tender \$150,000 to Wright in exchange for a release of the deed of trust on the Improved Parcel. He argues the Bankruptcy Court clearly erred when it found Spiegel's tenders were not valid because she did not have access to \$150,000 when the offers were made, and contends the court's findings are contradicted by Wallace's testimony that he had access to the money as a result of "a substantial consulting contract." (Appellant's Opening Br. ("Mot.") 21, 23, ECF No. 4.) Wallace argues the Bankruptcy Court should not have discredited his trial testimony because it was supported by his prior deposition testimony and by bankruptcy documents created prior to trial. (Mot. 23.)

Wright counters that the Bankruptcy Court acted within its discretion when it discredited Wallace's testimony because although critical to Spiegel's case, the testimony was not presented at the first trial, and other evidence suggested Wallace and Spiegel did not have access to \$150,000 at the time of the alleged tenders. (Opening Br. Of Appellees ("Opp'n") 21, ECF No. 7.)

Cal. Civ. Code § 1495 prescribes: "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." "To satisfy section 1495 [of the California Civil Code, a person] . . . must . . . be[] able to tender payment." In re Worcester, 811 F.2d 1224, 1230 (9th Cir. 1987). Ability to tender payment can be

1 demonstrated by showing access to either assets or credit in the
2 required amount. Backus v. Sessions, 17 Cal. 2d 380, 380-90
3 (1941) (finding plaintiff was able to perform because he
4 presented evidence that he "could have borrowed" the required
5 amount).

6 In the second trial, Wallace testified that he offered
7 to pay Wright \$150,000 during the March 2008 meeting and that he
8 had access to the money "probably . . . since the first of
9 February, maybe sooner." (RT-2, Vol. 1 p. 124.) Wright gave
10 conflicting testimony during the second trial testifying that
11 Wallace did not offer to pay him \$150,000 at the March 2008
12 meeting.

13 The oral findings of fact during the second trial
14 included the court's acknowledgment of a conflict between
15 Wallace's testimony and Wright's testimony, and the conclusion
16 that Wright's testimony was more credible. Specifically, the
17 Bankruptcy Court stated:

18 It's two people, conflict in the evidence, I
19 have to decide who is telling the truth
20 I heard the testimony of both parties. As so
21 often happens, I tend to believe most of the
22 witnesses, but in this situation I believe
23 Mr. Wright. . . . Because I had to make a
24 previous choice about who was telling the
truth, unfortunately Mr. Wallace's
credibility was put into doubt, and I don't
think there was any proof, per se, that he
had enough money at any given time to tender
\$150,000.

25 (RT-2, Vol. 2 p. 120.)

26 The Bankruptcy Court explained Wallace's credibility
27 had been "put into doubt" because the information about which he
28 testified during the second trial was "crucial" to Spiegel's

1 claim, yet this information was not presented at the first trial.
2 During the first trial, Wallace did not mention he had access to
3 \$150,000 at the time of the March 2008 meeting or that he offered
4 to write Wright a check for \$150,000 in the March 2008 meeting.
5 The court stated it "did not understand why" this information had
6 been presented for the first time at such a late stage of the
7 proceedings. (RT-2 Vol. 2, p. 119-20.)

8 The Bankruptcy Court's credibility determination was
9 consistent with other evidence submitted at trial. Although
10 Wallace testified that he had access to the money "probably . . .
11 since the first of February, maybe sooner," (RT-2 Vol. 1, pg.
12 124), a letter Spiegel's counsel sent to Wright dated February
13 27, 2008, states: "My client by way of this letter is tendering
14 to your client \$150,000, which would be available within two or
15 four weeks from the date of this letter." (Appellant's R.
16 Excerpts ("SRE") 15) (emphasis added). This letter suggests the
17 money was not available in February as Wallace testified during
18 the second trial.

19 Further, the deposition testimony and documents Wallace
20 cites as support for his trial testimony do not demonstrate that
21 the Bankruptcy Court clearly erred when finding Wallace lacked
22 access to \$150,000 in February and March 2008, since this
23 evidence does not show the funds were available in those months.
24 During Wallace's deposition, counsel asked him in which months he
25 received payment from the consulting contract and Wallace
26 responded: "I don't know" and "I don't want to speculate." (SRE
27 23.) A bankruptcy document on which Wallace relies indicates he
28 received payment on a construction consulting contract, but it

1 does not indicate that the payment was made in or before March
2 2008. (SRE 24.)

3 In light of the evidence in the record, the Bankruptcy
4 Court's determination that Spiegel did not have access to the
5 \$150,000 required to make a valid tender has not been shown to be
6 clearly erroneous.

7 **B. Waiver**

8 Wallace argues Wright and WG waived objection to
9 Spiegel's tender on the ground that she did not have access to
10 \$150,000 at the time of the alleged tender because Wright did not
11 raise this objection when Spiegel tendered the money; and when "a
12 party does not object to the form of the tender or the ability to
13 pay at the time of the offer but instead simply refuses to
14 consider the offer, the party waives its ability to raise such
15 objections at a later date." (Mot. 13.) Wallace cites Rose v.
16 Hecht, 94 Cal. App. 2d 662, 665-666 (1949) in support of this
17 argument. The Rose court held:

18 Where a creditor declines to negotiate with
19 his debtor concerning an offer of payment and
20 without making an objection to the form of
21 tender or inquiring as to the latter's
22 ability to pay the obligation, but merely
23 refuses to consider the offer to pay, it may
24 be assumed that any further attempt by the
25 latter would meet with like rebuff.

26 Rose, 94 Cal. App. 2d at 665-666.

27 However, Wallace has not shown this law is applicable
28 since the trial evidence demonstrates that through counsel,
29 Spiegel and Wright engaged in written communication and in-person
30 meetings regarding the proposed sale of the Improved Parcel and
31 the release clause during February and March 2008. (SRE 13-18)

1 (letters between Spiegel's counsel and either Wright or Wright's
2 counsel dated February 12, 2008 (SRE 13), February 20, 2008 (SRE
3 14), February 27, 2008 (SRE 15), February 28, 2008 (SRE 16), and
4 March 24, 2008 (SRE 18)); (e-mail correspondence between
5 Spiegel's counsel and Wright's counsel to set up an in-person
6 meeting on March 10, 2008 (SRE 17.)) Therefore, Wallace has not
7 shown that this argument justifies reversal.

8 **C. Refusal**

9 Wallace argues that even if Spiegel's tender was
10 ineffective, she had no legal obligation to tender the money to
11 Appellees because Wright stated he would refuse to release the
12 Improved Property even if Spiegel tendered \$150,000; and under
13 California Code of Civil Procedure § 2074 if a party refuses an
14 offer to perform, that refusal entirely excuses performance.

15 Section 2074 of the Code of Civil Procedure
16 provides that an offer in writing to pay a
17 sum of money if not accepted, is equivalent
18 to actual production and tender of the money
19 [;] th[is] section[] do[es] not affect
section [] 1495 of the Civil Code which
require[s] an offer to be made in good faith
and that the offeror must be willing and able
to perform according to the offer.

20 Backus v. Sessions, 17 Cal.2d 380, 389 (1941).

21 Section 2074 does not negate the requirement that a
22 party have the funds necessary to make a bona fide tender.
23 Therefore, Wallace has not shown that this argument justifies
24 reversal.

25 **D. Second Trial**

26 Wallace also argues the Bankruptcy Court "erred in
27 holding a second trial on the issues of tender and sale" since
28 "there was no reason for a second trial." (Mot. 29.)

1 Wright counters that a second trial was appropriate
2 because the Ninth Circuit "specifically directed the [B]ankruptcy
3 [C]ourt to make any necessary findings to resolve the competing
4 claims of the parties" and the Bankruptcy Court was acting in the
5 scope of the Ninth Circuit's remand order when it held the second
6 trial. (Opp'n 29.)

7 The Bankruptcy Court stated during the first trial it
8 focused on the issue of how the release clause was to be
9 interpreted. (RT-2, Vol. 2, p. 118:1-8.) The Ninth Circuit
10 reversed the Bankruptcy Court's interpretation of the release
11 clause and remanded the matter holding that the release clause
12 "required Wright Grandchildren L.P., upon the sale of the
13 Improved Property, to release the Improved Property if Spiegel
14 tendered \$150,000." (SER 8) (emphasis added.) The Ninth Circuit
15 states in the reversal order:

16 Having considered the plain language of the
17 contract, as well as the evidence offered to
18 prove the intention of the parties, see
19 Jones-Hamilton Co. v. Beazer Materials &
20 Services, Inc., 973 F.3d 688, 692 (9th Cir.
21 1992), we hold that the release clause in the
22 contract between Spiegel and Wright
23 Grandchildren L.P. is not ambiguous. It
24 should therefore be interpreted in accordance
25 with its plain language, giving effect to all
26 of its provisions. Cal. Civ. Code § 1638
(Deering 2012); Cal. Civ. Proc. Code § 1858
(Deering 2012). The clause required Wright
Grandchildren L.P., upon the sale of the
Improved Property, to release the Improved
Property if Spiegel tendered \$150,000.
Consistent with this decision, the case is
reversed and remanded for the bankruptcy
court to make any necessary findings to
resolve the competing claims of the parties.
REVERSED AND REMANDED.


27 (SRE 8).
28

The second trial conducted by the Bankruptcy Court concerning the issue of whether "Spiegel tendered \$150,000" falls within the Ninth Circuit's remand directive that the Bankruptcy Court "make any necessary findings to resolve the competing claims of the parties." Therefore, Wallace has not shown the Bankruptcy Court erred in holding a second trial.

IV. CONCLUSION

For the stated reasons, the Bankruptcy Court did not clearly err when it found Spiegel never made a valid tender to Appellees. Therefore, the Bankruptcy Court's order is AFFIRMED.

Dated: January 21, 2015


GARLAND E. BURRELL, JR.
Senior United States District Judge