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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE TENDERLOIN HEALTH,

No. C 13-04585 JSW

Debtors,

BANK OF THE WEST,

**ORDER REMANDING TO
BANKRUPTCY COURT FOR
FURTHER PROCEEDINGS**

Appellant,

v.

E. LYNN SCHOENMANN,

Appellee.

This matter comes before the Court upon consideration of the appeal of Bank of the West (“BOTW”) of the Bankruptcy Court’s Order denying a motion for attorneys’ fees in an adversary proceeding brought by Appellee E. Lynn Schoenmann (“Trustee”) captioned *Schoenmann v. Bank of the West*, AP No. 12-03171 (the “Adversary Proceeding”).¹ Pursuant to Civil Local Rule 16-4, the Court deems this case submitted on the papers without oral argument. After review of the record on appeal, consideration of the parties’ papers, and the relevant legal authority, the Court hereby REMANDS this matter to the Bankruptcy Court for further proceedings.

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¹ This matter is related to *In re Tenderloin Health, E. Lynn Schoenmann v. Bank of the West*, 13-CV-3992. The Court address the appeal of that case in a separate order issued this date.

BACKGROUND

The facts underlying this dispute are set forth in more detail in the Court’s Order affirming the Bankruptcy Court’s Order granting BOTW’s motion for summary judgment in the Adversary Proceeding. In brief, the Adversary Proceeding is a preference action, in which Trustee attempted to recover what it alleged was a preferential transfer from the debtor, Tenderloin Health (“Debtor”) to BOTW. On July 31, 2013, following a hearing, the Bankruptcy Court granted BOTW’s motion for summary judgment, and entered judgment in favor of BOTW.

On August 15, 2013, BOTW filed a motion for attorneys’ fees, and on September 12, 2013, following a hearing, the Bankruptcy Court denied that motion. (BOTW Excerpts of Record (“BOTW EOR”), Tab N (Tentative Ruling), Tab O (Order).)² BOTW asserted that it had a contractual right to attorneys’ fees based on attorneys’ fees provisions contained in promissory notes, a commercial security agreement, and a business loan agreement, which provide as follows:

Promissory Notes: ATTORNEYS’ FEES; EXPENSES. Lender may hire or pay someone else *to help collect this Note if Borrower does not pay.* Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender’s attorneys’ fees and Lender’s legal expenses, whether or not there is a lawsuit, *including attorneys’ fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction),* and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law.³

Commercial Security Agreement: Attorneys’ Fees; Expenses. Grantor agrees to pay upon demand all of Lender’s costs and expenses, including Lender’s attorneys’ fees and Lender’s legal expenses, *incurred in connection with the enforcement of this Agreement.* Lender may hire or pay someone else *to help enforce this Agreement,* and Grantor shall pay the costs and expenses of such enforcement. *Costs and expenses include Lender’s attorneys’ fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction),* appeals, and any anticipated post-judgment collection services. Borrower

² BOTW’s Excerpts of Record are located at Docket Nos. 7-1 through 7-22.

³ (See BOTW EOR, Tab C, Declaration of Lisa Lenherr (“Lenherr Decl.”), ¶ 3, Ex. A (BOTW’s Request for Admissions, Exs. A, B (emphasis added).))

1 also shall pay all court costs and such additional fees as may be directed by
2 the court.⁴

3 Business Loan Agreement: Attorneys’ Fees, Expenses. Borrower agrees to
4 pay upon demand all of Lender’s costs and expenses, including Lender’s
5 attorneys’ fees and Lender’s legal expenses, *incurred in connection with*
6 *the enforcement of this Agreement*. Lender may hire or pay someone else
7 to *help enforce this Agreement*, and Borrower shall pay the costs and
8 expenses of such enforcement. *Costs and expenses include Lender’s*
9 *attorneys’ fees and legal expenses whether or not there is a lawsuit,*
10 *including attorneys’ fees and legal expenses for bankruptcy proceedings*
11 *(including efforts to modify or vacate any automatic stay or injunction),*
12 appeals, and any anticipated post-judgment collection services. Borrower
13 also shall pay all court costs and such additional fees as may be directed by
14 the court.⁵

15 Applying California law, the Bankruptcy Court determined that BOTW could not rely
16 on the promissory notes to support its request for fees, because the debtor had paid its notes and
17 BOTW had not hired someone to collect the debt. It also determined that although the
18 promissory notes referred to bankruptcy proceedings, that provision “merely defines the scope
19 of actions for which [BOTW] would be entitled to attorney’s fees when ‘collecting’ on the note,
20 and does not create an independent basis for” BOTW to collect attorneys’ fees. (Tentative
21 Ruling at 4:21-5:19.)

22 The Bankruptcy Court concluded that BOTW was not entitled to attorneys’ fees based
23 on the commercial security agreement or the business loan agreements, because the fees
24 incurred during the adversary proceeding were not “‘incurred in connection with the
25 enforcement of” those agreements, and the bankruptcy proceedings clause served to define the
26 scope of actions for which BOTW would be entitled to fees incurred for enforcement of those
27 agreements. (*Id.* at 5:20-6:11.) Finally, the Bankruptcy Court stated that it did not believe any
28 of the agreements were ambiguous. However, it found, in the alternative, that if the terms

26 ⁴ (See BOTW EOR, Tab C, Lenherr Decl., ¶ 3, Ex. A (BOTW’s Request for
27 Admissions, Ex. D (emphasis added).)

28 ⁵ (See BOTW EOR Tab C, Lenherr Decl., ¶ 3, Ex. A (BOTW’s Requests for
Admissions, Ex. C (emphasis added).)

1 “collect” or “enforce” were ambiguous, it would resolve any ambiguities against BOTW as the
2 drafter of the agreements. (*Id.* at 6:12-7:4.)⁶

3 BOTW filed a timely notice of appeal and elected to proceed before this Court.

4 ANALYSIS

5 A. Standard of Review.

6 [A district court may] affirm, modify, or reverse a bankruptcy judge’s
7 judgment, order or decree or remand with instructions for further
8 proceedings. Findings of fact, whether based on oral or documentary
9 evidence, shall not be set aside unless clearly erroneous, and due regard
shall be given to the opportunity of the bankruptcy court to judge the
credibility of witnesses.

10 Fed. R. Bankr. P. 8013.

11 The Court reviews the bankruptcy court’s findings of fact for clear error, and it reviews
12 the bankruptcy court’s conclusions of law *de novo*. See *In re Part-Helena-Corp.*, 63 F.3d 877,
13 880 (9th Cir. 1995); see also *In re Chen*, 345 B.R. 197, 200 (N.D. Cal. 2006) (citing *In re Jan*
14 *Weilert RV, Inc.*, 315 F.3d 1192, 1196 (9th Cir. 2003)). The Court will not “disturb [the]
15 bankruptcy court’s award of attorneys’ fees unless the bankruptcy court abused its discretion or
16 erroneously applied the law.” *In re Kord Enterprises, II*, 139 F.3d 684 (9th Cir. 1998).

17 B. The Court Remands this Matter for Further Proceedings.

18 Under the “American Rule,” the prevailing party is not entitled to an award of attorneys’
19 fees, unless provided for by statute or contract. See *Travelers Casualty & Surety Company of*
20 *America v. Pacific Gas & Electric Company*, 549 U.S. 443, 448 (2007). California law also
21 permits an award of attorneys’ fees when authorized by contract, statute or law. See Cal. Code
22 Civ. P. §§ 1021, 1033.5(a)(10)(A)-(C).⁷ It is undisputed that BOTW had contracts with the
23 debtor that gave it a right to attorneys’ fees. The issue is whether the Bankruptcy Court’s
24 interpretation of those contracts was correct.

25 ⁶ The Bankruptcy Court declined to rule on whether the BOTW might be
26 entitled to attorneys’ fees under 11 U.S.C. section 503(b)(1)(a) or section 503(b)(6). (*Id.* at
27 7:5-28.) BOTW has not pressed those arguments on appeal.

28 ⁷ California Code Civil Code section 1717 governs awards of attorneys’ fees in
“any action on a contract.” BOTW does not argue that the preference claim would fall
within the ambit of Section 1717.

1 In order to determine whether a contract provides for a right to attorneys’ fees, courts
2 apply the ordinary rules of contract interpretation. Under statutory rules of
3 contract interpretation, the mutual intention of the parties at the time the
4 contract is formed governs interpretation. Such intent is to be inferred, if
5 possible, solely from the written provisions of the contract. The clear and
6 explicit meaning of these provisions, interpreted in their ordinary and
popular sense, unless used by the parties in a technical sense or a special
meaning is given to them by usage, controls judicial interpretation. Thus,
if the meaning a layperson would ascribe to contract language is not
ambiguous, we apply that meaning.

7 *Santisas v. Goodin*, 17 Cal 4th 599, 608 (1998) (internal quotations and citations omitted); *see*
8 *also* Cal. Civ. Code §§ 1636, 1638, 1639, 1644.

9 On appeal, BOTW does not suggest that the Trustee’s claim in the Adversary
10 Proceeding was an action to enforce the terms of any of the agreements or to collect on the
11 Promissory Notes. Rather, BOTW argues that the Bankruptcy Court failed to recognize that its
12 affirmative defenses were “inextricably intertwined” with “enforcement” and “collection”
13 which gave rise to its right to attorneys’ fees under these agreements.

14 BOTW did not raise this argument below. Further, it does not appear to be a settled
15 proposition under California law and may depend upon how broadly the attorneys’ fee clause is
16 drafted. *Compare Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal. App. 4th 263, 275
17 (2013) (“In our view, and action in which a party seeks to enforce or interpret a contract in
18 connection with either a claim alleged in the complaint or a defense alleged in an answer will
19 constitute and action to ‘enforce or interpret’ the contract.”) *with Gil v. Mansano*, 121 Cal. App.
20 4th 739, 743-44 (2004) (finding that asserting a defense does not constitute bringing an action
21 to enforce contract); *Excess Electronix v. Heger Realty Corp.*, 64 Cal. App. 4th 698, 712
22 (1998) (“Under any reasonable interpretation of the attorneys’ fee provision, we cannot equate
23 raising a ‘defense’ with brining an ‘action’ or ‘proceeding.’”).

24 Accordingly, the Court finds it appropriate to remand to the Bankruptcy Court so that it
25 may consider whether, in light of these cases, the terms of the promissory notes, business loan
26 agreement and the commercial security agreement would give BOTW a right to attorneys’ fees
27 based on the affirmative defenses raised in the preference action.

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CONCLUSION

For the foregoing reasons, the Court REMANDS for further proceedings. The Clerk shall remand this matter to the Bankruptcy Court forthwith.

IT IS SO ORDERED.

Dated: September 26, 2014



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE