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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE RICHARD AND SHEILA J. MCKNIGHT)
2000 FAMILY TRUST et al.,)

Plaintiffs,)

vs.)

WILLIAM J. BARKETT et al.,)

Defendants.)

2:10-cv-01617-RCJ-GWF

ORDER

This case arises out of the same facts as Case No. 2:07-cv-892. Nine motions are pending before the Court. For the reasons given herein, the Court will invite cross motions for summary judgment between DACA Castaic, LLC and Intervenor Plaintiffs for a declaration as to which parties currently hold the beneficial interests in the Castaic loans and guaranties. The Court grants the motions for attorneys’ fees and for certification of judgment in part, denies the motion to reconsider intervention, grants the motion to stay enforcement of judgment, denies the motion to dismiss the crossclaim but grants the motion to strike it, grants the motion to dismiss the Kapp Complaint in Intervention in part and denies it in part, denies the motion to dismiss the Rasmussen Complaint in Intervention, and denies the motion to dismiss the counterclaim.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Richard McKnight,¹ as trustee for The Richard & Sheila J. McKnight 2000

¹Richard McKnight is a apparently both a beneficiary and the trustee of the McKnight Trust, as well as one of the McKnight Trust’s attorneys in this action.

1 Family Trust (“the McKnight Trust”) provided \$100,000 out of the total of \$4.5 million that
2 various direct lenders loaned to Defendant Castaic III Partners, LLC (“Castaic III”) through USA
3 Commercial Mortgage Co. (“USA Commercial”). (Compl. ¶ 5, Sept. 21, 2010, ECF No. 1). The
4 McKnight Trust has received no interest payments on the loan since August 2006. (*Id.* ¶ 9).

5 Plaintiff sued Defendants Castaic III and William J. Barkett in this Court on two claims:
6 (1) Breach of Guaranty (Barkett only); and (2) Declaratory Judgment. The Court previously
7 denied a motion to reconsider transfer of the case from the Hon. Gloria M. Navarro to this Court,
8 dismissed the second cause of action for declaratory judgment, granted offensive summary
9 judgment on the first cause of action for breach of guaranty, and permitted 260 other direct
10 lenders to intervene as Plaintiffs and to add claims against Castaic Partners, LLC (“Castaic” or
11 “Tapia Ranch”) and Castaic II Partners, LLC (“Castaic II”).

12 Each group of intervenors has filed its own complaint in intervention. Intervenor
13 Plaintiffs Thomas J. Kapp and Cynthia S. Roher, as trustees of the T&C Kapp Family Trust (the
14 “Kapp Intervenors”) filed a complaint in intervention (the “Kapp CI”) against Barkett and
15 Castaic II for breach of contract, breach of guaranty, and declaratory judgment. (*See* Kapp CI,
16 May 12, 2011, ECF No. 34). The remaining Intervenor Plaintiffs (the “Rasmussen Intervenors”)
17 have also filed a complaint in intervention (the “Rasmussen CI”) against Barkett, Castaic,
18 Castaic II, and Castaic III for breach of contract, breach of guaranty, and declaratory judgment.
19 (*See* Rasmussen CI, Aug. 8, 2011, ECF No. 61). The Rasmussen CI alleges the amount each
20 Rasmussen Intervenor loaned the Castaic entities. (*See id.* ¶¶ 5, 67–69). A third group of
21 intervenors withdrew its motion to intervene.

22 **II. LEGAL STANDARDS**

23 **A. Attorneys’ Fees and Certification of Judgment**

24 Although an award of attorney’s fees must be separately supported by statute or contract,
25 Rule 54(d) mandates an award of costs to a prevailing party. *See* Fed. R. Civ. P. 54(d)(1).

1 When an action presents more than one claim for relief--whether as a claim,
2 counterclaim, crossclaim, or third-party claim--or when multiple parties are involved,
3 the court may direct entry of a final judgment as to one or more, but fewer than all,
claims or parties only if the court expressly determines that there is no just reason for
delay.

4 Fed. R. Civ. P. 54(b).

5 **B. Dismissal**

6 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
7 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
8 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
9 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
10 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
11 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
12 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
13 failure to state a claim, dismissal is appropriate only when the complaint does not give the
14 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
15 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
16 sufficient to state a claim, the court will take all material allegations as true and construe them in
17 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
18 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
19 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
20 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
21 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
22 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly v.*
23 *Bell Atl. Corp.*, 550 U.S. 554, 555 (2007)).

24 “Generally, a district court may not consider any material beyond the pleadings in ruling
25 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the

1 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
2 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
3 whose contents are alleged in a complaint and whose authenticity no party questions, but which
4 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
5 motion to dismiss” without converting the motion to dismiss into a motion for summary
6 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
7 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
8 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
9 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
10 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
11 Cir. 2001).

12 **III. ANALYSIS**

13 **A. Motions for Attorneys’ Fees and Certification of Judgment**

14 Movants seek attorneys’ fees against Barkett pursuant to the Castaic III promissory note
15 (the “Note”) that he guaranteed. Movants claim the Note includes a provision for the payment of
16 reasonable attorneys’ fees in any action to enforce the Note, though they do not attach the Note
17 to their motion. As Barkett notes in response, it is the Guaranty, not the Note, that governs any
18 attorneys’ fees between Plaintiffs and Barkett. Barkett admits, however, that the Guaranty
19 contains a similar fee-shifting provision. Attorney McKnight attests to all of the rates and hours
20 as presented in the attached exhibits. (*See* McKnight Decl. Aug. 9, 2011, ECF No. 69, at 4–5).
21 Exhibit A consists of an invoice from Attorney McKnight to the McKnight Trust listing total
22 attorneys’ fees of \$26,424 in connection with the present case: 65.9 hours for McKnight at \$360
23 per hour, 7 hours for David Mincin at \$300 per hour, and 3 hours for Matthew McAlonis at \$200
24 per hour. (*See* McKnight Decl., Ex. B, ECF No. 69-1, at 2–5). Exhibit B consists of a bill of
25 costs for \$774.25: \$390 for clerk’s fees, \$125 for service of summons and subpoena, and

1 \$259.25 for other costs not further itemized.

2 Barkett opposes the motion on several grounds. First, he argues that Plaintiffs lack
3 standing in the case, because they allegedly transferred their interests in the Castaic Notes and
4 Guaranties to another entity, which then transferred them to DACA Castaic, LLC.

5 Second, Barkett asks the Court to stay the motion pending appeal. But consideration of a
6 stay of judgment is separate from whether attorneys' fees should be granted. Barkett may ask
7 the Court to stay enforcement pending appeal, but such a stay does not prevent the Court from
8 ruling on attorneys' fees, even if that ruling is also stayed pending appeal. If an appeal is
9 successful, or if the Court vacates the judgment itself, the Court may also vacate any attorneys'
10 fee award.

11 Third, Barkett argues that Plaintiffs are not entitled to fees because "legislative policy"
12 behind attorneys' fee awards is to award only those fees actually incurred. Barkett does not
13 present any authority in support of his argument that an attorneys' fees claimant must provide
14 proof that he has paid the fees before demanding an award against the opposing party. Whether
15 the attorneys' fees claimant has yet paid his bill is purely a matter between the claimant and his
16 attorney. So long as he can show that he has become obligated to pay fees, he is entitled to an
17 award in the amount of the reasonably incurred obligation.

18 Fourth, Barkett argues that Plaintiffs are not entitled to attorneys' fees because McKnight
19 represented himself in his capacity as the trustee of the McKnight Trust, and he also represented
20 the McKnight Trust, of which he is a beneficiary. Pro se parties, whether attorneys or not, are
21 generally not entitled to *statutory* attorneys' fees. *See Elwood v. Drescher*, 456 F.3d 943, 947
22 (9th Cir. 2006) (citing *Kay v. Ehrler*, 499 U.S. 432 (1991)). But this rule is based on the
23 assumption that the policy behind statutory attorneys' fees provisions is to ensure the effective
24 prosecution of statutory causes of action, such as civil rights claims, by encouraging the retention
25 of independent counsel. *See id.* at 946. The purpose of contractual attorneys' fees clauses is to

1 ensure that the innocent party is made whole by litigation over a breach and not only made
2 partially whole due to a requirement to pay an attorney to enforce the contract. Still, it is
3 probably improper to award attorneys fees to a pro se attorney where a pro se non-attorney
4 would not be entitled to such fees, because it would create an improper assumption that an
5 attorney's private time used to litigate his own case is more valuable than a non-attorney's
6 private time, even where both pro se litigants are equally successful. *See Farmers Ins. Exch. v.*
7 *Law Offices of Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1237 (9th Cir. 2001) (California law).
8 The rule does not apply where a fee claimant has become liable for fees to some third party. *See*
9 *id.* at 1238. The question here is whether McKnight or the McKnight Trust have become liable
10 for fees to any third party. The McKnight Trust is liable to Richard McKnight, P.C. for the full
11 amount claimed. McKnight is not the sole beneficiary of the McKnight Trust, so his
12 representation of the McKnight Trust is not like a traditional pro se representation. McKnight is
13 himself jointly liable with the McKnight Trust to Richard McKnight, P.C. Furthermore, a trust
14 must be represented by counsel, and nothing prevents a beneficiary or trustee from representing
15 a trust unless the terms of the trust prohibit it. The Court will therefore grant the motion for
16 attorneys' fees in part and certify the judgment as final.

17 Fifth, Barkett argues that the fees should be reduced because both parties prevailed in
18 part. Plaintiffs prevailed completely on their monetary claims. Defendants prevailed against
19 Plaintiffs' claim that one of the Court's rulings in the Asset Resolution bankruptcy case
20 precluded certain litigation in state court in California. Overall, Plaintiffs have prevailed,
21 because they obtained a ruling in this case that not only awards them the monetary relief they
22 sought, but also likely precludes Defendants' claims in the California case.

23 Sixth, Barkett argues that the Court should adjust from Plaintiffs' proffered lodestar
24 calculation. Barkett argues that \$26,424 is excessive for an award of \$100,000 plus interest.
25 McKnight's itemized bill is available. In reply, Plaintiffs state that they would agree to a stay if

1 Barkett posted a supersedeas bond of \$220,000 to cover the approximately \$160,000 judgment
2 on which interest is running at 20% per annum. The Court will grant the motion in part. The
3 amount will be reduced to \$18,325.² The Court will stay fees and costs upon the posting of a
4 cost bond but will not stay the case itself.

5 **B. Motions to Dismiss**

6 **1. Defendants' Motion to Dismiss the Kapp CI (ECF No. 71)**

7 Defendants make three arguments against the Kapp CI. First, they argue that the Kapp
8 Intervenors have no standing because they (and other Intervenors) may have transferred their
9 beneficial interest in the Castaic II loan to third party DACA-Castaic, LLC. In fact, DACA-
10 Castaic is one of the parties that recently moved to intervene, but it later withdrew that motion.
11 DACA-Castaic's proposed complaint in intervention alleged that it had acquired the interests of
12 S&P Davis, LP, Taylor Samuels, Samuels Foundation, Inc., and Platinum Properties 1 Inc. in the
13 Castaic, Castaic II, and Castaic III loans, variously. DACA-Castaic also noted that the Court
14 appointed Cross FLS, LLC ("Cross") as loan servicer for all the Castaic loans on June 8, 2010,
15 and that Cross had assigned the servicing rights to DACA-Castaic. (*See* Compl. in Intervention
16 ¶¶ 49–56, Aug. 8, 2011, ECF No. 65-1). According to DACA-Castaic, the direct lenders, i.e.,
17 the Intervenor Plaintiffs, have membership interests in Castaic Investors, LLC proportionate to
18 the interests in the Castaic loans that they transferred to that entity. Defendants argue that the
19 Kapp Intervenors therefore have no standing, and that the Court should either dismiss the Kapp
20 CI or stay the action until it determines who has the present beneficial interest in the Castaic
21 loans.

22 The Kapp Intervenors counter that the purchase agreement between the direct lenders and
23 DACA-Castaic did not purport to transfer the rights under any promissory note or guaranty, and

24
25 ²The Court will award all hours claimed but at rates of \$200 (7 hours), \$150 (3 hours),
and \$250 (65.9 hours).

1 that DACA-Castaic only obtained the deeds of trust. Assuming for the sake of argument that the
2 direct lenders retained their interests in the notes and guaranties, but transferred their interests in
3 the deeds of trust, there are two legal consequences. First, the direct lenders have standing to sue
4 directly on the notes and guaranties. Second—and this is dicta, because the issue is not before
5 the Court—neither DACA-Castaic nor the direct lenders may foreclose on the Castaic properties,
6 because DACA-Castaic cannot suffer a default without an interest in the note, and the direct
7 lenders no longer have any security instrument. That is, the note and deed of trust would have
8 been split in such a way that foreclosure cannot occur unless and until the same party owns both
9 the note and deed of trust on a given property. The Court will not dismiss based on lack of
10 standing. Although Defendants may be able to show a lack of standing at the summary judgment
11 stage as a factual matter, the Kapp Intervenors properly allege an interest in the loans and
12 guaranties.

13 Next, Defendants make the same personal jurisdiction, venue, and abstention arguments
14 that the Court has already addressed and rejected. Defendants next correctly note that the third
15 cause of action in the Kapp CI fails to state a claim for the same reason that the Court has
16 already dismissed Plaintiffs’ identical claim for declaratory relief. The Court grants the motion
17 to dismiss in this regard.

18 **2. Defendants’ Motion to Dismiss the Rasmussen CI (ECF No. 74)**

19 Defendants make the same standing, personal jurisdiction, venue, and abstention
20 arguments against the Rasmussen CI that they make against the Kapp CI. The Rasmussen CI’s
21 claim for declaratory judgment is different from the claim that the Court has already dismissed
22 from the Complaint, and Defendants do not argue against it. The Court denies the motion.

23 **3. Plaintiffs’ Motion to Dismiss the Crossclaim (ECF No. 91)**

24 On August 30, 2011, Defendants filed a “Crossclaim” against Compass FP Corp.,
25 Compass Financial Partners, LLC, Compass USA SPE, LLC, Debt Acquisition Company of

1 America V, DACA-Castaic, LLC, and unidentified direct lenders incorporated only by reference
2 to the loans. This is not a crossclaim. As to parties who were not yet part of the case, it is a
3 third-party complaint or perhaps a motion to join parties as defendants. As to Intervenor
4 Plaintiffs (direct lenders) it is a counterclaim.

5 Plaintiffs have moved to dismiss the “Crossclaim.” Although the “Crossclaim” may be
6 improper, Defendants are correct that a counterclaim or crossclaim need not necessarily appear
7 in an answer but may be separately pled, particularly where a new group of Plaintiffs has
8 intervened against Defendants. The Court will not dismiss the “Crossclaim” for this reason,
9 though it will strike the pleading, as explained, *infra*.

10 **4. Defendants’ Motion to Dismiss the Counterclaim (ECF No. 118)**

11 In response to the “Crossclaim,” DACA-Castaic, LLC and Debt Acquisition Company of
12 America V filed a “Counterclaim” for declaratory judgment against Defendants, and Defendants
13 have now moved to dismiss it. Defendants have filed their same standing, personal jurisdiction,
14 venue, and abstention arguments. According to Defendants, the DACA entities claim all
15 beneficial interests in the Castaic loans, not just the deeds of trust as Intervenor Plaintiffs argue.
16 Defendants correctly argue that the direct lenders and DACA-Castaic cannot simultaneously
17 possess the same interests in the same loans. It is for this reason that the Court will not dismiss
18 the “Counterclaim” for declaratory judgment. The Court will need to sort out who owns the
19 beneficial interests in the Castaic loans. Defendants have a valid point that they cannot be liable
20 to both Intervenor Plaintiffs and DACA-Castaic for the same debt.

21 **C. Motion to Reconsider Permission to Intervene (ECF No. 76)**

22 Defendants ask the Court to reconsider permitting Intervenor Plaintiffs to intervene.
23 Defendants note the possibility that DACA-Castaic, and not Intervenor Plaintiffs, possess the
24 beneficial interests in the Castaic loans. The Court will await motions for summary judgment on
25 the issue of loan ownership.

1 118) is DENIED.

2 IT IS FURTHER ORDERED that the Motion to Reconsider (ECF No. 76) is DENIED.

3 IT IS FURTHER ORDERED that the Motion to Stay Enforcement of Judgment (ECF
4 No. 95) is GRANTED in part.

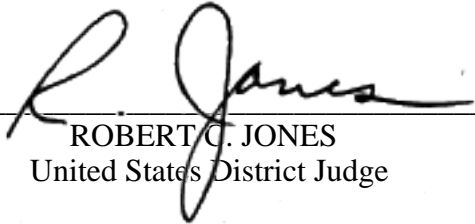
5 IT IS FURTHER ORDERED that the Motion to Strike Crossclaim (ECF No. 108) is
6 GRANTED.

7 IT IS SO ORDERED.

8 Dated this 5th day of December, 2011.

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ROBERT C. JONES
United States District Judge

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