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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANCH BANKING AND TRUST
COMPANY,

Plaintiff,

v.

REGENA HOMES, LLC, *et al.*,

Defendants.

Case No. 2:12-cv-00451-APG-GWF

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES
AND NONTAXABLE COSTS**

ECF No. 180

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Plaintiff Branch Banking and Trust Company has moved for an award of its attorney's fees and nontaxable costs incurred in connection with this matter. BB&T brought this action in March 2012, alleging that the defendants had failed to repay a loan. It sought judgment for the unpaid principal due on the loan, plus fees, costs, and interest. ECF No. 1. On July 23, 2014, my predecessor on this case, Judge Jones, granted summary judgment in BB&T's favor on the defendants' liability for their respective breaches of the loan's promissory note (the "Promissory Note") and commercial guaranty (the "Commercial Guaranty"). ECF No. 110. Following a trial to determine damages, a judgment was subsequently entered in favor of BB&T and against the defendants, jointly and severally, in the amount of \$1,975,766.24. ECF No. 178. BB&T now seeks attorney's fees in the amount of \$217,159.26 and nontaxable costs and expenses in the amount of \$11,022.22.

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The defendants oppose the motion, arguing that BB&T has failed to comply with Local Rule 54-16 and therefore the motion should be denied in its entirety. They also contend that BB&T's fee request is unreasonable for various reasons. They argue that BB&T's request for nontaxable costs should also be denied because the loan documents do not permit recovery of such costs.

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I. LEGAL STANDARD

"If state substantive law governs a case, then an award of attorney fees is also governed by state law." *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 218 (9th Cir. 2013). Federal courts

1 in diversity cases follow the law of the state in which the district court sits, including with respect
2 to issues of conflict of laws. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). “Nevada tends to
3 follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of law
4 questions involving contracts.” *Progressive Gulf Ins. Co. v. Faehnrich*, 752 F.3d 746, 750 (9th
5 Cir. 2014) (citation omitted). “The law of the state chosen by the parties to govern their
6 contractual rights and duties will be applied.” Restatement (Second) of Conflict of Laws § 187(1)
7 (1971). Regarding the right to attorney’s fees, Nevada law “ha[s] consistently held that attorney’s
8 fees are only available when authorized by a rule, statute, or contract.” *Flamingo Realty, Inc. v.*
9 *Midwest Dev., Inc.*, 879 P.2d 69, 73 (Nev. 1994) (citations and quotation omitted).

10 The reasonableness of an attorney’s fee award is also determined by state law when a
11 federal court is sitting in diversity. *Mangold v. Cal. Pub. Util. Comm’n*, 67 F.3d 1470, 1478 (9th
12 Cir. 1995). In Nevada, “the method upon which a reasonable fee is determined is subject to the
13 discretion of the court,” which “is tempered only by reason and fairness.” *Shuette v. Beazer*
14 *Homes Holdings Corp.*, 124 P.3d 530, 548-49 (Nev. 2005) (quoting *Univ. of Nev. v. Tarkanian*,
15 879 P.2d 1180, 1188, 1186 (Nev. 1994)). One permissible method of calculation is the lodestar
16 approach, which involves multiplying “the number of hours reasonably spent on the case by a
17 reasonable hourly rate.” See *id.* at 549 & n.98 (quoting *Herbst v. Humana Health Ins. of Nev.*, 781
18 P.2d 762, 764 (Nev. 1989)); see also *Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1325-26 (D.
19 Nev. 2014). In most cases, the lodestar figure is a presumptively reasonable fee award. *Camacho*
20 *v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

21 In determining the reasonableness of a fee request, I am guided by the factors listed in
22 *Brunzell v. Golden Gate National Bank*:

- 23 (1) the qualities of the advocate: his ability, his training, education,
24 experience, professional standing and skill; (2) the character of the work to
25 be done: its difficulty, its intricacy, its importance, time and skill required,
26 the responsibility imposed and the prominence and character of the parties
27 where they affect the importance of the litigation; (3) the work actually
28 performed by the lawyer: the skill, time and attention given to the work; (4)
the result: whether the attorney was successful and what benefits were
derived.

1 455 P.2d 31, 33 (Nev. 1969); *see also* *Haley v. Dist. Ct.*, 273 P.3d 855, 860 (Nev. 2012) (“[i]n
2 determining the amount of fees to award, the court is not limited to one specific approach; its
3 analysis may begin with any method rationally designed to calculate a reasonable amount, so long
4 as the requested amount is reviewed in light of the factors set forth in *Brunzell*” (quotation and
5 citation omitted)). I also am guided by the factors set forth in Local Rule 54-16(b). *See Schneider*
6 *v. Elko Cty. Sheriff’s Dep’t*, 17 F. Supp. 2d 1162, 1166 (D. Nev. 1998). That rule provides that
7 the motion must include the following:

- 8 (1) A reasonable itemization and description of the work performed;
- 9 (2) An itemization of all costs sought to be charged as part of the fee
award and not otherwise taxable pursuant to LR 54-1 through 54-15;
- 10 (3) A brief summary of:
 - 11 (A) The results obtained and the amount involved;
 - 12 (B) The time and labor required;
 - 13 (C) The novelty and difficulty of the questions involved;
 - 14 (D) The skill requisite to perform the legal service properly;
 - 15 (E) The preclusion of other employment by the attorney due to
acceptance of the case;
 - 16 (F) The customary fee;
 - 17 (G) Whether the fee is fixed or contingent;
 - 18 (H) The time limitations imposed by the client or the
circumstances;
 - 19 (I) The experience, reputation, and ability of the attorney(s);
 - 20 (J) The undesirability of the case, if any;
 - 21 (K) The nature and length of the professional relationship with the
client;
 - 22 (L) Awards in similar cases; and,
- 23 (4) Such other information as the Court may direct.

24 LR 54-16(b).

25 Although state law governs whether a party is entitled to attorney’s fees, federal law
26 dictates the procedure for requesting attorney’s fees. *Carnes v. Zamani*, 488 F.3d 1057, 1059 (9th
27 Cir. 2007). A motion for attorney’s fees and related nontaxable costs must be filed no later than
28 14 days after the entry of judgment. Fed. R. Civ. P. 54(d)(2)(B)(i). The motion must state the
amount sought or provide a fair estimate. Fed. R. Civ. P. 54(d)(2)(B)(iii). The motion must be
accompanied by an affidavit from the attorney responsible for the billings in the case to
authenticate the information contained in the motion and to confirm that the bill has been

1 reviewed and edited and that the fees and costs charged are reasonable. LR 54-16(c). “Failure to
2 provide the information required by LR 54–16(b) and (c) in a motion for attorneys’ fees
3 constitutes a consent to the denial of the motion.” LR 54-16(d). The Local Rules also permit an
4 award of attorney’s fees to include costs and expenses that are not otherwise taxable pursuant to
5 Rule 54(d)(2) (*i.e.*, nontaxable costs). *See* LR 54-16(b)(2).

6 **II. ANALYSIS**

7 **A. Attorney’s Fees**

8 BB&T requests an attorney’s fee award of \$217,159.26. In support, it attaches the
9 affidavit of Jeremy J. Nork, Esq., lead counsel for BB&T, and a table detailing the requested
10 attorney’s fees. BB&T argues that the Promissory Note and Commercial Guaranty authorize
11 such an award. The Promissory Note is governed by Nevada law and, with respect to attorney’s
12 fees and costs, states:

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14 In the event that suit be brought hereon, or any attorney be employed or
15 expenses be incurred to compel payment of this Note or any portion of the
16 indebtedness evidenced hereby, whether or not any suit, proceeding or any
17 judicial or non-judicial foreclosure proceeding be commenced, Borrower
18 promises to pay all such expenses and reasonable attorney’s fees, including,
19 without limitation, any attorneys’ fees incurred in any bankruptcy proceeding.

20 ECF No. 78-1 at 10. The Commercial Guaranty is also governed by Nevada law and contains
21 similar language. *See* ECF No. 78-1 at 43-44, 46. The parties do not dispute that the provisions in
22 the Promissory Note and Commercial Guaranty entitle BB&T to some amount of attorney’s fees
23 related to this litigation. Because Nevada law states that attorney’s fees are available when
24 authorized by a contract, BB&T is entitled to attorney’s fees and costs based on the Promissory
25 Note and Commercial Guaranty.

26 It appears that BB&T’s proposed attorney’s fee award was calculated by multiplying the
27 number of hours spent on the case by the hourly rate of each associate or employee. This is the
28 basic formation of the lodestar method and is presumed reasonable unless the factors listed in
Brunzell or Local Rule 54-16 dictate a different result.

1 of economies of scale,” they cite no evidence to support this argument. I find that BB&T’s
2 motion complies with Local Rule 54-16’s requirements.

3 *ii. Reasonableness of Attorney’s Fees*

4 The defendants argue that the attorney’s fees BB&T requests are unreasonable for various
5 reasons.

6 *1. Utilization of Numerous Personnel*

7 The defendants argue that “[o]n its face, utilizing eleven different people for one case is
8 unreasonable.” ECF No. 184 at 5. They cite no case law in support of this argument. BB&T
9 responds that the lead partner and lead associate on the case have never changed, but that at times
10 it utilized other associates and employees for various assignments to be cost-effective. It also
11 contends that the litigation has been ongoing for several years and therefore various associates
12 who have worked on the matter needed to be replaced over time if they left the firm or took leave.
13 The use of different associates at various times throughout a case is not *per se* unreasonable and
14 the defendants have given no explanation why BB&T’s use of different associates during the
15 course of this case was unreasonable.

16 *2. The Fees are Excessive in Light of the Nature of the Litigation*

17 The defendants next argue that the requested fee award is excessive because the matter
18 only went to trial on damages, and yet Mr. Nork’s fees account for 55% of the total attorney’s fee
19 request. They argue that because Mr. Nork is a “trial attorney,” and because “the bulk of the
20 Action was resolved on pre-trial motions and partial summary judgment,” his fees account for a
21 disproportionate amount of the total award. *Id.* BB&T responds that Mr. Nork was lead counsel
22 in this matter and that a jury trial took place which required Mr. Nork’s experience.

23 The defendants cite no case law or evidence to support their contention that a trial attorney
24 who is lead counsel on a case should not be involved in a case until trial is set to begin. Nor do
25 they offer any evidence or case law to support their argument that Mr. Nork’s specific billing
26 rates or percentages are unreasonable.

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1 various extensions of the stay were requested. It also contends that it was appropriate and
2 reasonable to oppose the defendants' motion to stay.

3 I agree. The fees related to opposing the stay, and those incurred during the stay, were
4 reasonable. BB&T reasonably opposed the defendants' motion to stay. The work that occurred
5 during the stay totaled a little over 20 hours, took place over several months, and most appear
6 related to responding to extensions of the stay. These fees are reasonable.

7 **B. Nontaxable Costs**

8 BB&T also requests nontaxable costs in the amount of \$11,022.22. It argues that it is
9 entitled to costs under the loan documents and that both Rule 54(d)(1) and Local Rule 54-1 allow
10 a prevailing party to recover nontaxable costs. The defendants argue that BB&T fails to identify
11 the contractual language that entitles it to nontaxable costs. They further argue that the itemized
12 table of costs includes both taxable and nontaxable costs, lacks the appropriate descriptions, and
13 that BB&T has failed to provide backup receipts.

14 Rule 54(d) contains two separate provisions for costs. To request taxable costs, the
15 prevailing party must file a bill of costs with the clerk. LR 54-1. Taxable costs are taxed by the
16 clerk rather than the Court. Fed. R. Civ. Proc. 54(d)(1); LR 54-1. The categories of taxable costs
17 are circumscribed by 28 U.S.C. § 1920. *See also* LR 54-1. For example, filing fees and service of
18 process expenses are taxable costs. *See* 28 U.S.C. § 1920(1).

19 By contrast, nontaxable costs are recoverable on a motion to the court under Rule 54(d)(2)
20 along with attorney's fees. Fed. R. Civ. Proc. 54(d)(2) ("claim for attorney's fees and related
21 nontaxable expenses") & Advisory Comm. Note to 1993 Am. ("This new paragraph establishes a
22 procedure for presenting claims for attorneys' fees, whether or not denominated as 'costs.' It
23 applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable
24 under governing law incident to the award of fees."); *see also* LR 54-16(b)(2) (a motion for
25 attorney's fees must include "[a]n itemization of all costs sought to be charged as part of the fee
26 award and not otherwise taxable pursuant to LR 54-1 through 54-15"). For example, copy,
27 postage, travel, research, and Pacer expenses are nontaxable costs.

1 An award of costs involves a two-step inquiry. I must first determine who is a “prevailing
2 party” under Rule 54, and then I must determine “how much (if any) costs should be awarded to
3 the prevailing party.” *Shum v. Intel Corp.*, 629 F.3d 1360, 1366 (Fed. Cir. 2010); *Ass’n of Mex.-*
4 *Am. Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000) (noting that district courts have
5 discretion in choosing to award costs under Rule 54(d)). In the Ninth Circuit, there is a
6 presumption in favor of awarding costs to the prevailing party. *Dawson v. City of Seattle*, 435
7 F.3d 1054, 1070 (9th Cir. 2006). To overcome this presumption, the losing party must establish a
8 reason to deny costs. *Id.*

9 The Promissory Note states: “In the event that suit be brought hereon, . . . Borrower
10 promises to pay all such expenses and reasonable attorney’s fees.” ECF No. 78-1 at 10. The
11 Commercial Guaranty contains similar language. *See id.* at 43-44. Additionally, Rule 54 and
12 Local Rule 54-1 allow a prevailing party³ to recover nontaxable costs. Therefore, BB&T is
13 entitled to some award of nontaxable costs based on the federal and local rules and the
14 Promissory Note and the Commercial Guaranty.

15 However, it is unclear from the motion and exhibits what costs BB&T is seeking in its
16 request. The motion cites Rule 54(d)(1) for its request for nontaxable costs, but that subsection
17 relates to taxable costs. BB&T provides a table outlining various costs presumably associated
18 with this case, but the table includes both taxable and nontaxable expenses. *See* ECF No. 180-1 at
19 31-33. Additionally, the bottom of the table includes a total of \$12,959.80 in costs, yet BB&T
20 requests only \$11,022.22. Thus, even if I assume BB&T mistakenly cited to the wrong
21 subsection of Rule 54 in its request for nontaxable costs, it is still unclear how BB&T calculated
22 the \$11,022.22 it requests. It is therefore also impossible to determine if that amount is accurate
23 or if the costs listed are the types covered under Rule 54(d)(2). I therefore deny BB&T’s request
24 for nontaxable costs without prejudice. BB&T has 14 days from the date of this Order to file a
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27 ³ Neither party disputes that BB&T is a prevailing party for purposes of awarding costs.

1 new motion for nontaxable costs consistent with this Order, Federal Rule of Civil Procedure
2 54(d)(2), and Local Rule 54-16(b)(2).⁴

3 **III. CONCLUSION**

4 IT IS THEREFORE ORDERED that plaintiff Branch Banking and Trust Company's
5 motion for attorney's fees and nontaxable costs (**ECF No. #180**) is **GRANTED in part and**
6 **DENIED in part**. It is denied as to the \$640 in fees associated with the FDIC assignment, and
7 the \$315 in fees associated with the spreadsheets of expenses. It is also denied without prejudice
8 as to nontaxable costs. Branch Banking and Trust Company has 14 days from the date of this
9 order to file an updated motion for nontaxable costs.

10 IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of the
11 plaintiffs and against the defendants for attorney's fees in the amount of \$216,204.26.

12 DATED this 6th day of September, 2016.

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16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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25 ⁴ The defendants also argue that BB&T did not submit receipts for its nontaxable costs,
26 yet they cite no case law, statute or local rule which requires this. Local Rule 54-16(b) requires
27 "[a]n itemization of all costs sought to be charged as part of the fee award and not otherwise
28 taxable." If there are specific itemized costs which the defendants wish to dispute because they
believe them to be unreasonable, they are free to highlight those specific entries in their
opposition to any renewed motion for nontaxable costs BB&T may file.