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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 EAGLE SPE NV I, INC.,)
9)
10 Plaintiff,) 3:12-CV-00245-RCJ-WGC
11 vs.)
12)
13 KILEY RANCH COMMUNITIES et al.,) **ORDER**
14 Defendants.)
15 _____)

16 This case arises out of the default of four commercial loans. Pending before the Court is
17 a Motion for Summary Judgment (ECF No. 108). For the reasons given herein, the Court grants
18 the motion and dismisses the Counterclaim (ECF Nos. 24, 27).

19 **I. FACTS AND PROCEDURAL HISTORY**

20 Between April 2007 and February 2008, non-party Colonial Bank gave Defendant Kiley
21 Ranch Communities (“Kiley Ranch”) four loans totaling \$45 million (the “Loans”) in order to
22 build Kiley Ranch North (the “Development”) in Sparks, Nevada. (*See* Am. Compl. ¶ 14, June 7,
23 2012, ECF No. 5). Each of the Loans was made via its own promissory note and was secured by
24 a Common Deed of Trust (the “CDOT”) against the Development. (*Id.* ¶ 15). The Loans were
25 further secured by separate guaranties (the “Guaranties”), all of which were signed by Defendants
Matthew N. Kiley, individually and as trustee of the Matthew N. Kiley Trust; Megan L. Kiley,
individually and as trustee of the Megan L. Kiley Trust; L. David Kiley, as trustee of the

1 Matthew N. Kiley Trust and as trustee of the Megan L. Kiley Trust; and Michael and Kellee
2 Kiley, both individually and as trustees of the Michael P. Kiley and Kellee Kiley Living Trust
3 Instrument (collectively, “Guarantors”). (*See id.* ¶¶ 4–9, 16).¹

4 Repayment on each of the Loans was originally due within one year, but Colonial Bank
5 granted Kiley Ranch three extensions on the \$20 million, \$2 million, and \$13 million loans and
6 one extension on the \$10 million loan via separate Loan Modifications. (*Id.* ¶ 17).² When the last
7 of the Loans matured on July 20, 2009, Kiley Ranch owed Colonial Bank \$41,023,667.99 under
8 the Loans. (*Id.* ¶ 18).

9 On August 14, 2009, the FDIC put Colonial Bank into receivership after the State
10 Banking Department of the State of Alabama closed it. (*Id.* ¶ 21). The FDIC transferred the
11 rights to the Loans to non-party BB&T the same day, recording an “Assignment of Security
12 Instruments, Notes and Other Loan Documents” (the “FDIC Assignment”) in Washoe County.
13 (*Id.* ¶ 22).³

14 On September 14, 2009, counsel for BB&T sent Kiley Ranch and Guarantors demand
15 letters as to each of the Loans. (*Id.* ¶ 19).⁴ On March 2, 2010, after Kiley Ranch and Guarantors
16 refused to honor the Notes and Guaranties, BB&T executed a Notice of Default and Election to
17 Sell (the “NOD”), which it recorded in Washoe County on March 4, 2010. (*Id.* ¶¶ 24–25).⁵ On
18 July 15, 2010, the trustee under the CDOT, non-party Western Title Co., noticed a trustee’s sale
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21 ¹The Loan Agreements are adduced as Exhibits 1–4 to the Amended Complaint (“AC”);
22 the promissory notes (the “Notes”) are adduced as Exhibits 5–8; the CDOT and modifications
thereto are adduced as Exhibits 9–11; and the Guaranties are adduced as Exhibits 12–15.

23 ²The Loan Modifications are adduced as Exhibits 16–25 to the AC.

24 ³The FDIC Assignment is adduced as Exhibit 30 to the AC.

25 ⁴The demand letters are adduced as Exhibits 26–29 of the AC.

⁵The NOD is adduced as Exhibit 31 to the AC.

1 for August 12, 2010 via a Notice of Trustee’s Sale (the “NOS”). (*Id.* ¶ 26).⁶ In August 2010,
2 however, before either the trustee’s sale or the effective date of Nevada Revised Statutes
3 (“NRS”) section 40.459(1)(c), BB&T assigned its rights to the Notes, CDOT, Guaranties, and
4 other loan documents to Plaintiff Eagle SPE NV I, Inc. (“Eagle”) via an Assignment of Deed of
5 Trust (the “BB&T Assignment”), which it recorded in Washoe County. (*See id.* ¶ 27).⁷ The
6 Development was eventually sold to non-party Rising Tides LLC via trustee’s sale on November
7 8, 2011 for \$9.8 million, after NRS section 40.459(1)(c) had taken effect. (*See id.* ¶ 28).⁸ The
8 fair market value of the Development on the date of the trustee’s sale was approximately \$10.5
9 million, (*id.* ¶ 30), leaving a deficiency of approximately \$35,682,908.60, (*id.* ¶ 31).

10 Plaintiff sued Defendants in this Court for: (1) Deficiency (against Kiley Ranch); (2)
11 Breach of Guaranty (against Guarantors); and (3) Breach of the Implied Covenant of Good Faith
12 and Fair Dealing (against Guarantors). Defendants included with their Answer counterclaims
13 for: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing;
14 (3) Intentional Interference with Prospective Economic Advantage; and (4) Declaratory
15 Judgment.

16 Plaintiff moved to dismiss certain counterclaims and affirmative defenses as precluded by
17 a previous state court action. Plaintiff also moved to dismiss Defendants’ affirmative defense
18 and counterclaim under NRS section 40.459(1)(c), arguing that it did not apply retroactively to
19 the Loans. Defendants asked the Court to certify the latter issue to the Nevada Supreme Court or
20 at least stay the case until the Nevada Supreme Court ruled in two pending consolidated appeals
21 (*Sandpointe Apartments, LLC v. Dist. Ct.*, No. 59507 and *Nielsen v. Dist. Ct.*, No. 59823) that
22 were expected to determine the issue or at least inform a resolution. The Court denied the

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24 ⁶The NOS is adduced as Exhibit 32 to the AC.

25 ⁷The BB&T Assignment is adduced as Exhibit 33 to the AC.

⁸The Trustee’s Deed is adduced as Exhibit 34 to the AC.

1 motions to dismiss, without prejudice, and granted the motion to stay. The Nevada Supreme
2 Court later ruled on the merits in *Sandpointe* and denied the writ petition in *Nielsen*, and Plaintiff
3 filed a new motion to dismiss the counterclaim under NRS section 40.459(1)(c) and strike the
4 related affirmative defense under NRS section 40.459(1)(c). The Court granted that motion,
5 ruling that the statute did not apply retroactively to pre-enactment assignments, and that if it did
6 it would violate the Contract Clause in the present case. Defendants moved to dismiss for lack of
7 subject matter jurisdiction, and the Court denied the motion. Plaintiff has moved for summary
8 judgment against Defendants' remaining three counterclaims.

9 **II. LEGAL STANDARDS**

10 A court must grant summary judgment when "the movant shows that there is no genuine
11 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
12 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
14 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
15 principal purpose of summary judgment is "to isolate and dispose of factually unsupported
16 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary
17 judgment, a court uses a burden-shifting scheme:

18 When the party moving for summary judgment would bear the burden of proof at
19 trial, it must come forward with evidence which would entitle it to a directed verdict
20 if the evidence went uncontested at trial. In such a case, the moving party has the
initial burden of establishing the absence of a genuine issue of fact on each issue
material to its case.

21 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
22 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
23 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
24 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
25 demonstrating that the nonmoving party failed to make a showing sufficient to establish an

1 element essential to that party's case on which that party will bear the burden of proof at trial.

2 *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden,
3 summary judgment must be denied and the court need not consider the nonmoving party's
4 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

5 If the moving party meets its initial burden, the burden then shifts to the opposing party to
6 establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
7 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party
8 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
9 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
10 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
11 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
12 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
13 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
14 allegations of the pleadings and set forth specific facts by producing competent evidence that
15 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

16 At the summary judgment stage, a court’s function is not to weigh the evidence and
17 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
18 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
19 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
20 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

21 **III. ANALYSIS**

22 Plaintiff first argues that the counterclaims for breach of contract, breach of the implied
23 covenant of good faith and fair dealing, and intentional interference with prospective economic
24 advantage (“IIPEA”) should be dismissed as precluded because Kiley Ranch brought those
25 claims against Plaintiff’s predecessor-in-interest, BB&T, in state court, and the state court

1 entered a final judgment against Kiley Ranch on those claims. The first amended complaint in
2 the state court case, No. CV09-02753 (Second Judicial District Court, Washoe County, Nevada)
3 includes claims for breach of contract, contractual bad faith, accounting, and declaratory relief.
4 (See First Am. Compl. in Case No. CV09-02753, ECF No. 109-1). The state court granted
5 summary judgment on those claims. (See Order in Case No. CV09-02753, ECF No. 109-5). The
6 allegations in the Counterclaim are based on the same facts as the allegations in the first amended
7 complaint in the state court case, i.e., refusal to make further loan disbursements or to honor a
8 “Set-Aside Agreement.” (Compare Answer & Countercl. 5–13, ECF No. 27, with See First Am.
9 Compl. in Case No. CV09-02753 at 2–8, ECF No. 109-1).

10 Neither the first amended complaint nor the order addresses any IIPEA claim by name;
11 however, it is clear the issues upon which that claim is based are precluded, as well. In the
12 Counterclaim, Defendants argue that Plaintiff’s predecessor-in-interest interfered with the
13 prospective sale of both severable water rights on the Development and the Development itself.
14 But the state court explicitly ruled that Plaintiff’s predecessor-in-interest did not act wrongfully
15 in refusing to permit the sale of water rights on the Development, because it had the contractual
16 discretion whether to approve or such a sale. Kiley Ranch had presented that issue as one of
17 several bases for its breach of contract and contractual bad faith claims. The issue is therefore
18 precluded, which makes an IIPEA claim based on the thwarted water rights sale impossible. Nor
19 can such a claim succeed on the theory that Plaintiff’s predecessor-in-interest wrongfully failed
20 to disburse certain moneys, because the state court has already ruled that those refusals were not
21 wrongful but were within the lender’s contractual discretion.

22 Plaintiff has met its initial burden on summary judgment to present evidence that would
23 entitle it to a directed verdict if the evidence went uncontested at trial. Defendants have
24 responded by agreeing to the dismissal of their Counterclaims.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 108) is GRANTED and the Counterclaim (ECF Nos. 24, 27) is DISMISSED.

IT IS SO ORDERED.

] DATED this 25th day of January, 2016.

ROBERT C. JONES
United States District Judge