

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANCH BANKING AND TRUST
COMPANY, a North Carolina banking
corporation,

Plaintiff,

vs.

MICHAEL E. JARRETT, an individual; D.
GERALD BING, JR., an individual; D.
GERALD BING, JR., Trustee of the D.
GERALD BING, JR. TRUST dated January
17, 2000; and DOES 1 through 10, inclusive,

Defendants.

3:13-cv-00235-RCJ-VPC

ORDER

This case arises out of the default of a commercial loan and the alleged failure of three guarantors to honor a guaranty on the loan. Defendants have moved for an evidentiary hearing (ECF No. 10) and partial summary judgment (ECF No. 20). For the reasons given herein, the Court grants the Motion for an Evidentiary Hearing and denies the Motion for Partial Summary Judgment.

I. BACKGROUND AND PROCEDURAL HISTORY

The following facts are undisputed. Colonial Bank, N.A. (“Colonial”) loaned Clock Tower Center, LLC (“Clock Tower”) \$3,400,000 in exchange for a promissory note (the “Note”). (Compl. ¶ 12, May 07, 2013, ECF No. 1). Clock Tower’s obligations were secured by a deed of trust (the “Deed of Trust”), which collateralized real property located in Gardnerville, Nevada (the “Property”). (*Id.* ¶ 14). Clock Tower’s indebtedness was further secured by a guarantee (the “Guarantee”), executed by three guarantors: Defendants Jarrett, Bing, and the

1 Bing Trust (collectively “Defendants” or “Guarantors”). (*Id.* ¶ 15). Defendants Jarrett and Bing
2 hold a combined 67.5% interest in Clock Tower, LLC. (Am. Statement of Financial Affairs, ECF
3 25-1, at 10).

4 Colonial’s interest in the loan was ultimately acquired by Plaintiff Branch Banking and
5 Trust Company (“BB&T”). (*Id.* ¶¶ 18–21). When the Note matured in April 2011, neither Clock
6 Tower nor the Guarantors paid BB&T, (*Id.* ¶ 23), and Clock Tower filed for Chapter 11
7 bankruptcy before BB&T could conduct a foreclosure sale. (*Id.* ¶ 24). On April 4, 2013, the
8 Bankruptcy Court entered an order confirming Clock Tower’s plan for reorganization (the
9 “Bankruptcy Plan”) (*Id.* ¶ 25). Under the Bankruptcy Plan, BB&T’s secured claim was reduced
10 to \$2,960,000 to reflect the decreased value of the real estate. (*Id.* ¶ 26). BB&T was also granted
11 an unsecured deficiency claim of \$297,045 payable over six years. (*Id.*).

14 BB&T has filed this action against the Guarantors to enforce the Guarantee, arguing that
15 because Clock Tower has failed to satisfy its obligations under the Loan Documents, the
16 Guarantors are jointly and severally liable for the entire \$3,400,000 originally due on the loan.
17 (*Id.* ¶ 28). BB&T also seeks an award of fees and costs incurred during the bankruptcy
18 proceedings, which it claims it is entitled to under the terms of the Guarantee. (*Id.* ¶ 35).

20 Defendants have filed a Motion for Partial Summary Judgment (ECF No. 20), contending
21 that BB&T is not entitled to collect its fees and costs for its efforts in the Clock Tower
22 bankruptcy because: (1) BB&T did not bring “legal action” for purposes of the attorneys’ fees
23 provision in Section 9 of the Guarantee; and (2) BB&T was not the “successful or prevailing
24 party,” as required by Section 9. (Mot. Partial Summ. J., ECF No. 20, at 6–7). BB&T responds,
25 arguing that in addition to bringing the required legal action, it was also a prevailing party because
26 its participation in the proceedings resulted in a favorable outcome. Specifically, BB&T notes
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1 that its participation resulted in the bankruptcy court’s reduced valuation of BB&T’s secured
2 claim, and that but for this reduction, Clock Tower would be required to pay less per month,
3 causing BB&T to bear a greater risk of non-payment. (Opp’n to Mot. Partial Summ. J., ECF No.
4 25, at 5 (citing Summ. of Schedules, ECF No. 25-2, at 1; First Am. to Debtor’s Plan of
5 Reorganization, ECF No. 25-3, at 2–3; Findings of Fact & Conclusions of Law, ECF No. 20-2, at
6 10)). Because of its actions in the bankruptcy proceedings, BB&T is due to receive an additional
7 \$92,866.48 over the next six years. (*Id.*).

9 Defendants have also filed a Motion for an Evidentiary Hearing (ECF No. 10), arguing
10 (1) that NRS § 40.495(4)(a) requires the Court to hold a hearing to determine the fair market
11 value of the property; and (2) that NRS § 40.495(4)(b)(1) limits the Court’s authority to enter
12 judgment against the Guarantors to the “amount by which the amount of the indebtedness
13 exceeds that fair market value of [the Property] as of the date of the commencement of the
14 action.” (Mot. for Hr’g, ECF No. 10, at 3–4). BB&T contends that because the value of the
15 property was recently determined in contested bankruptcy proceedings, in which Guarantors
16 Jarrett and Bing participated, the issue is subject to collateral estoppel, and therefore, a hearing is
17 unnecessary. (Opp’n to Mot. for Hr’g, ECF No. 18, at 2–3).

20 **II. LEGAL STANDARDS**

21 In reviewing a motion for summary judgment, the court construes the evidence in the
22 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
23 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment “if the movant shows
24 that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
25 matter of law.” Fed.R.Civ.P. 56(a). Material facts are “facts that might affect the outcome of the
26 suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.
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1 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such that a
2 reasonable jury could return a verdict for the nonmoving party. *Id.*

3 The moving party bears the initial burden of identifying the portions of the pleadings and
4 evidence that the party believes to demonstrate the absence of any genuine issue of material fact.
5 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). A
6 party asserting that a fact cannot be or is genuinely disputed must support the assertion by “citing
7 to particular parts of materials in the record, including depositions, documents, electronically
8 stored information, affidavits or declarations, stipulations (including those made for purposes of
9 the motion only), admissions, interrogatory answers, or other materials” or “showing that the
10 materials cited do not establish the absence or presence of a genuine dispute, or that an adverse
11 party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B).
12 Once the moving party has properly supported the motion, the burden shifts to the nonmoving
13 party to come forward with specific facts showing that a genuine issue for trial exists. *Matsushita*
14 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538
15 (1986). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be
16 insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”
17 *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for
18 summary judgment “by relying solely on conclusory allegations unsupported by factual data.”
19 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “Where the record taken as a whole could
20 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for
21 trial.” *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.
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1 **III. ANALYSIS**

2 **A. Motion for Partial Summary Judgment**

3 As a preliminary matter, the Court notes that a federal district court exercising diversity
4 jurisdiction is required to apply the substantive law of the state in which it sits. *Erie R.R. v.*
5 *Tompkins*, 304 U.S. 64, 78 (1938). Under Nevada law, attorneys’ fees and costs are recoverable
6 when such an award is authorized by a statute, rule, or contractual provision. *Albios v. Horizon*
7 *Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). When the facts are not in
8 dispute, an issue of contract interpretation of is a question of law. *Shelton v. Shelton*, 119 Nev.
9 492, 497, 78 P.3d 507, 510 (2003).

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11 The Guarantors contend that BB&T is not entitled to collect any fees or costs under
12 Section 9 of the Guarantee, which governs the award of fees and costs. The Court disagrees.
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14 Section 9 of the guarantee provides, in relevant part, that:

15 If any legal action or any arbitration or other proceeding (including a proceeding
16 in bankruptcy) is brought for the *enforcement* of any provisions of this Guarantee
17 or any of the Loan Documents or because of an alleged dispute, breach, Event of
18 Default or misrepresentation in connection with any of the provisions of any of
19 the Loan Documents, the *successful or prevailing* party shall be entitled to
recover reasonable attorneys’ fees and other costs incurred in that action
proceeding.

20 (Guarantee, ECF No. 20-1, at 6). The Guarantors support their conclusion with three arguments,
21 none of which are persuasive.

22 First, the Guarantors claim that Section 9 does not contemplate voluntary bankruptcy
23 petitions, such as Clock Tower’s. The defect in this argument is that Section 9 does not qualify
24 particular types of bankruptcy proceedings; it simply states that it applies to “a proceeding in
25 bankruptcy.” If, as the Guarantors claim, this provision was meant to apply to involuntary
26 bankruptcies exclusively, it should have included qualifying language to that effect. *See Love v.*
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1 *Love*, 114 Nev. 572, 580, 959 P.2d 523, 529 (1998) (“Where language in a document is clear and
2 unambiguous on its face, the court must construe it based on this plain language.”). Moreover,
3 the Guarantors provide no reason why the parties would agree that attorney’s fees would be
4 available in an involuntary bankruptcy but not a voluntary bankruptcy. In either case, BB&T
5 would have to participate in order to protect its interest as Clock Tower’s largest creditor and
6 would accrue fees and costs in an effort to preserve its rights under the Note and the Deed of
7 Trust. Therefore, the Court declines Guarantor’s invitation to infer such a limitation from the
8 plain language of Section 9. *See Ellison v. California State Auto. Ass’n*, 106 Nev. 601, 603, 797
9 P.2d 975, 977 (1990) (“It has long been the policy in Nevada that absent some countervailing
10 reason, contracts will be construed from the written language and enforced as written.”).

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13 Next, Guarantors argue that even if Section 9 contemplates an involuntary bankruptcy
14 proceeding, BB&T’s participation in the Clock Tower bankruptcy did not concern “the
15 enforcement of any provisions . . . in any of the Loan Documents.” (Mot. Partial Summ. J., ECF
16 No. 20, at 6). Specifically, Guarantors contend that because BB&T’s participation in the
17 bankruptcy was limited to filing a motion to lift the automatic bankruptcy stay and raising
18 objections to the reorganization plan, its actions were merely procedural and “had no substantive
19 legal connection to the Deed of Trust.” (Reply, ECF No. 29, at 5). The Court disagrees. BB&T
20 participated in the bankruptcy for the precise purpose of protecting its ability to enforce its rights
21 under the Note and the Deed of Trust. Indeed, BB&T’s ability to enforce the terms of the Loan
22 Documents, including the amount of Clock Tower’s total indebtedness under the Note, and the
23 value BB&T’s security under the Deed of Trust, post-confirmation, hinged on its ability to
24 reserve those rights pre-confirmation.
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1 Furthermore, BB&T was forced to participate in Clock Tower’s bankruptcy “because of
2 an . . . Event of Default,” within the language of Section 9. This is because Clock Tower’s,
3 \$3,400,000 indebtedness to BB&T, which it sought to reorganize under Chapter 11, was not
4 triggered until it defaulted on the Note. (Promissory Note, ECF No. 26-1). Thus, but for Clock
5 Tower’s failure to pay the note (i.e., the “Event of Default”), BB&T would have had no reason to
6 participate in the bankruptcy proceedings in the first place. Accordingly, the Court finds that
7 BB&T’s participation in the bankruptcy proceedings constitutes a legal action for purposes of
8 triggering Section 9.
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10 Finally, the Guarantors argue that even if BB&T took the requisite legal action, it “was
11 clearly not the successful or prevailing party” because each of its motions and objections failed.
12 (Mot. Partial Summ. J., ECF No. 20, at 7). What this argument fails to consider, however, is that
13 by participating in the bankruptcy proceedings BB&T significantly bettered its position as Clock
14 Tower’s creditor. Indeed, the parties do not dispute that BB&T’s participation resulted in a
15 \$92,866.48 increase in Clock Tower’s monthly payment plan. (Opp’n to Mot. Partial Summ. J.,
16 ECF No. 25, at 5).
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19 While Nevada case law does not define “prevailing party” in the contractual context, the
20 interpretation applied in the statutory context is instructive: “[a] plaintiff may be considered the
21 prevailing party for attorney fee purposes if it succeeds on any significant issue in litigation
22 which achieves some of the benefit it sought.” *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485-86,
23 851 P.2d 459, 464 (1993) (quoting *Hornwood v. Smith’s Food King No. 1*, 105 Nev. 188, 192,
24 772 P.2d 1284, 1287 (1989); see also *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d
25 1198, 1200 (2005) (noting that the term “prevailing party” is broadly construed). Here, the
26 record reveals that by participating in the bankruptcy proceedings, BB&T succeeded in
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1 significantly strengthening its position as a post-confirmation creditor. Therefore, the Court finds
2 that BB&T is a prevailing party for purposes of Section 9. Accordingly, BB&T is entitled to a
3 conservative award of reasonable costs and fees, to the extent that it can prove them on summary
4 judgment or at trial.¹

5 **B. Motion for Evidentiary Hearing**

6 In the present action, BB&T seeks to enforce an obligation to pay an indebtedness
7 secured by a Deed of Trust on the Property. Because a foreclosure process has not been initiated,
8 NRS §40.495 expressly limits this Court’s authority with respect to how and whether it can
9 render judgment against the Guarantors. Specifically, NRS §40.495 provides:
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11 *4. If, before a foreclosure sale of real property, the obligee commences an action*
12 *against a guarantor, surety or other obligor, other than the mortgagor or grantor*
13 *of a deed of trust, to enforce an obligation to pay, satisfy or purchase all or part*
14 *of an indebtedness or obligation secured by a mortgage or lien upon the real*
15 *property:*

16 (a) *The court must hold a hearing and take evidence presented by either party*
17 *concerning the fair market value of the property as of the date of the*
18 *commencement of the action. Notice of such hearing must be served upon all*
19 *defendants who have appeared in the action and against whom a judgment is*
20 *sought, or upon their attorneys of record, at least 15 days before the date set for*
21 *the hearing.*

22 (b) *After the hearing, if the court awards a money judgment against the*
23 *guarantor, surety or other obligor who is personally liable for the debt, the court*
24 *must not render judgment for more than:*

25 (1) *The amount by which the amount of the indebtedness exceeds the fair market*
26 *value of the property as of the date of the commencement of the action*

27 (emphasis added). This statute plainly requires the Court to schedule a hearing so that it can take
28 evidence and determine: (1) the fair market value of the Property as of the date of the Complaint

¹The Court notes that while BB&T contends that it has an alternative claim to fees and costs as part of the guaranteed indebtedness, the Court need not address this issue, having determined that BB&T is entitled to such an award under Section 9 of the Guarantee.

1 and (2) the amount by which the indebtedness exceeds the fair market value of the property, if it
2 does at all. If the Court finds that the fair market value of the Property exceeds the indebtedness,
3 the Court has no authority award any judgment for alleged amounts due under the Guarantee.

4 BB&T contends that the Guarantors are collaterally estopped from seeking a hearing.
5 This argument fails. As an initial matter, BB&T has cited no authority for the implied
6 proposition that the doctrine of collateral estoppel can be used to circumvent a statutorily-
7 imposed limitation on the Court's authority to enter a judgment against the Guarantors.
8 Nevertheless, even if the Guarantors could be collaterally estopped, BB&T cannot meet the
9 doctrine's requirements.
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11 To foreclose relitigation of an issue under collateral estoppel: "(1) the issue at stake must
12 be identical to the one alleged in the prior litigation; (2) the issue must have been actually
13 litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must
14 have been a critical and necessary part of the judgment in the earlier action." *Clark v. Bear*
15 *Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Here, the issue at stake is the value of
16 the Property as of the date that BB&T filed its Complaint in this Court. This issue was not
17 *actually litigated* in the bankruptcy proceedings, nor could it have been, because the bankruptcy
18 proceedings predated the Complaint. Instead, the Bankruptcy Court relied on appraisals
19 performed in 2012 in reaching its value determination. Moreover, the bankruptcy valuation and
20 the valuation this Court is required to perform under NRS §40.495 are unlikely to be identical
21 due to variables that have changed with passage of time. Therefore, the doctrine of collateral
22 estoppel is inapplicable to the issue at hand.
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25 Finally, to the extent that BB&T argues that "revisiting the value of the collateral . . . is
26 an exercise futility" because it would not change what Clock Tower owes under the
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1 Confirmation Order, (Opp'n to Mot. for Hr'g, ECF No. 18, at 3), the Court disagrees. First,
2 BB&T has failed to cite any authority for the implied proposition that the Confirmation Order
3 necessarily dictates, or is even relevant to, the amount recoverable under the Guarantee. In
4 contrast, bankruptcy courts have repeatedly found that actions against non-debtor guarantors are
5 state law claims that are not impacted by a debtor's bankruptcy. *In re Extended Stay Inc.*, 418
6 B.R. 49, 58 (Bankr. S.D.N.Y. 2009) *aff'd in part*, 435 B.R. 139 (S.D.N.Y. 2010) (noting that the
7 court could find no authority "supporting an argument that the Bankruptcy Code preempts state
8 law contract claims against a non-debtor who has independently guaranteed a debtor's
9 obligations"); *In re S. Edge LLC*, 478 B.R. 403, 418 (D. Nev. 2012) (explaining that a
10 bankruptcy court's finding that confirmation did not affect a guaranty under applicable state law
11 is consistent with well settled law) (citing 11 U.S.C. § 524(e); *In re Am. Hardwoods, Inc.*, 885
12 F.2d 621, 625 (9th Cir. 1989)).

15 Second, in the present case, the bankruptcy court determined the value of the property
16 (based on 2012 appraisals) so that it could establish the amount of the secured and unsecured
17 claims against Clock Tower. While the value of those claims is fixed as to Clock Tower, this is
18 an entirely separate action, brought against new parties, to enforce a guarantee. Under these
19 circumstances, Nevada law clearly requires the Court to hold a hearing to determine the fair
20 market value of the property as of the date of the complaint, and it limits BB&T to recovering
21 the "indebtedness" as of that date. That such hearing would not be futile is obvious: if BB&T
22 believed that the value of the property had decreased between the date of the bankruptcy and the
23 date of the Complaint, it would undoubtedly want to hold a hearing to establish a greater
24 indebtedness. Accordingly, the Court grants the Guarantors' motion for an evidentiary hearing to
25 determine the value of the Property at the time the present action was filed.
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CONCLUSION

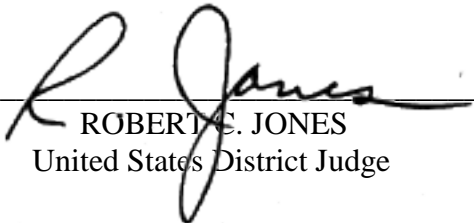
IT IS HEREBY ORDERED that the Motion for Partial Summary Judgment (ECF No. 20) is DENIED.

IT IS FURTHER ORDERED that the Motion for an Evidentiary Hearing (ECF No.10) is GRANTED.

IT IS FURTHER ORDERED that the Evidentiary Hearing at which the Court will take evidence to determine the fair market value of the Gardnerville property as of the date of the Complaint shall be held on Tuesday, November 12, 2013 at 10:00 AM, in Reno Courtroom 6, before Chief Judge Robert C. Jones.

IT IS SO ORDERED.

Dated: This 22nd day of October, 2013.


ROBERT C. JONES
United States District Judge