FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
April 8, 2014
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOE BETTENCOURT BORGES, also known as Joe B. Borges, doing business as J&M Dairy, and MARIA ROCHA BORGES, also known as Maria R. Borges, doing business as J&M Dairy, Debtors.	BAP No. NM-13-038
AG NEW MEXICO, FCS, ACA, AG NEW MEXICO, FCS, PCA, and AG NEW MEXICO, FCS, FLCA, Plaintiffs – Appellees, v. JOE BETTENCOURT BORGES and MARIA ROCHA BORGES, Defendants – Appellants, and DAVID BORGES, a married man, dealing in his sole and separate estate, FRANK BORGES, a single man, ATKINS ENGINEERING ASSOCIATES, INC., a New Mexico Corporation, CLIFF WAIDE, doing business as Waide Irrigation Service and Supply, UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, PECOS VALLEY PUMP, INC., a New Mexico Corporation, JORDAN DAIRY SERVICE, LLC, a New Mexico Corporation, CWBC, INC., a New Mexico Corporation, ALL UNKNOWN CLAIMANTS OF	Bankr. No. 10-12800 Adv. No. 10-01170 Chapter 11 OPINION*

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

INTEREST, In The Premises Adverse To The Plaintiffs,

Defendants – Appellees.

IN RE JOE BETTENCOURT BORGES, also known as Joe B. Borges, doing business as J&M Dairy, and MARIA ROCHA BORGES, also known as Maria R. Borges, doing business as J&M Dairy,

Debtors.

BAP No. NM-13-039

JOE BETTENCOURT BORGES and MARIA ROCHA BORGES,

Plaintiffs – Appellants,

v.

AG NEW MEXICO, FCS, ACA, AG NEW MEXICO, FCS, PCA, and AG NEW MEXICO, FCS, FLCA,

Defendants – Appellees.

Bankr. No. 10-12800
Adv. No. 11-01012
Chapter 11

IN RE JOE BETTENCOURT BORGES, also known as Joe B. Borges, doing business as J&M Dairy, and MARIA ROCHA BORGES, also known as Maria R. Borges, doing business as J&M Dairy,

Debtors.

BAP No. NM-13-040

JOE BETTENCOURT BORGES and MARIA ROCHA BORGES,

Plaintiffs – Counter-Defendants – Appellants,

v.

AG NEW MEXICO, FCS, ACA, AG

Bankr. No. 10-12800
Adv. No. 11-01105
Chapter 11

NEW MEXICO, FCS, PCA, and AG NEW MEXICO, FCS, FLCA,

Defendants – Counter-Claimants – Appellees,

and

NATIONAL MILK PRODUCERS FEDERATION, doing business as Cooperatives Working Together,

Defendant.

Appeal from the United States Bankruptcy Court for the District of New Mexico

Before MICHAEL, NUGENT, and SOMERS, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

A party who prevails, even partially, may be awarded costs. But in bankruptcy cases, unlike civil cases, there is no presumption for an award of costs to the prevailing party. Bankruptcy courts have broad discretion when faced with a motion for costs and may require bad acts on the part of the nonprevailing party as a condition to allow costs to the prevailing party. Under the facts of this case, we conclude that the bankruptcy court did not abuse its discretion in denying the debtors' request for costs and AFFIRM the order denying costs.

I. Factual Background

The debtors, Maria Borges and Joe Borges (now deceased) were dairy farmers doing business as J & M Dairy (collectively the "Borgeses"). These appeals are the second appellate challenge by the Borgeses regarding the debts owed to AGNM.[1] The complete facts underlying these appeals are fully set out in

[1] We refer to the first appellate challenge as the "Merit Appeals," *see* BAP Appeal Nos. NM-13-05, -06, -07, -11, -12, and -13. In the Merit Appeals, the (continued...)

this Court's opinion issued in the Merit Appeals, as well as the underlying order in that appeal, and will not be repeated here except as relevant to our analysis on the denial of costs.

In 2006, the Borgeses executed three notes in favor of AGNM: 1) the Cow Note (a revolving line of credit to purchase and feed cattle), 2) the Equipment Note, and 3) the Facility Note. All three notes were cross-collateralized, secured by the Borgeses' cattle, including any replacements, as well as by all milk and milk proceeds, all crops including hay and other feed, all farm equipment, any accounts receivable, the dairy facility, and the adjacent farmland. On June 6, 2006, AGNM filed security agreements and financing statements to perfect its interest in the personal property, a mortgage to perfect its interest in the real property ("2006 Mortgage"), and Change of Ownership of Water Rights forms to perfect its interest in the appurtenant water rights. The 2006 Mortgage, however, did not include all the real property which both AGNM and the Borges had intended to include at the time it was signed. Specifically, it did not include 220 acres of farmland attached to the dairy facility and used to grow crops for feed (the "Additional 220 Acres"). On March 13, 2009, AGNM unilaterally filed a mortgage that included the Additional 220 Acres (the "Corrected Mortgage"). AGNM did not obtain signatures from either of the Borges, nor did it request signatures from them.

In mid-2008, due to continued operating losses (approximately $200,000 as of September 2008), the decline in milk prices, rise in feed costs, and the bleak

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[1] (...continued)
parties cross-appealed the bankruptcy court's judgment issued on December 31, 2012. AGNM appealed: 1) the avoidance of its lien on the water rights identified in the Change of Ownership of Water Rights forms and 2) the avoidance of its lien on the 220-acre parcel described in the Corrected Mortgage. The Borgeses appealed: 1) the conclusion that AGNM acted reasonably in its transactions with them, 2) the dismissal of their counterclaims, 3) the rejection of their affirmative defenses, and 4) the post-petition interest calculation.

outlook for dairy farmers, the Borgeses decided to get out of the dairy business. The Borgeses' plan was to: 1) sell the herd by the end of the year and pay off the Cow Note, 2) take the excess proceeds from the sale of the herd to pay off their accounts payable and fund the purchase of two, unrelated farms, 3) restructure the Facility Loan to annual payments with a lower interest rate, and 4) sell the dairy in 2009 and pay off the remaining two notes. AGNM, however, expected to receive all the proceeds from the sale of the herd.

While the Borgeses were attempting to sell the herd, AGNM continued to advance funds to the Borgeses to maintain the cows. Regular timely feeding of the cows was essential to protecting the collateral's value as hungry cows produced less milk, and if the cows stopped producing milk altogether, they became less valuable "beef cows."[2] AGNM also extended the maturity dates on the Cow Note three times, from December 1, 2008 to January 1, 2009, to February 1, 2009, to April 1, 2009, and finally to June 2009.

In March 2009, the parties' relationship deteriorated when a deal to sell the herd for $7.6 million failed to close after AGNM provided the buyer with a $9.4 million payoff figure for all three notes (instead of just the payoff amount for the Cow Note).[3] The Borgeses claimed AGNM intentionally torpedoed the deal by demanding $9.4 million from the buyer. AGNM denied it was attempting to torpedo the deal, and explained it provided the buyer with the $9.4 million payoff in order to give the buyer a complete debt picture and signify that AGNM was entitled to all the proceeds from the sale.

The Borgeses eventually liquidated the herd through the Herd Retirement Program of Cooperatives Working Together ("CWT"), a nationwide program that

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[2] May 29, 2012 Trial Tr., Testimony of Maria Borges at 55-56, *in* Borgeses App. at 4447-48.

[3] Whether or not the $9.4 million payoff statement actually caused the deal to collapse is questionable.

paid dairies to stop producing milk, send their cattle to slaughter, and stay out of the dairy business for at least a year. The proceeds from the retirement of the herd totaled approximately $5.2 million. AGNM received approximately $1.2 million in June 2009, but CWT held the remaining proceeds because a dispute arose between the Borgeses and AGNM as to its dispersal.[4] The Borgeses insisted that AGNM did not have a lien on these proceeds and requested CWT send them a check payable to them only, while AGNM asked any proceeds checks be payable to AGNM and the Borgeses jointly.

In 2009, AGNM filed a complaint in state court to collect the CWT proceeds and to foreclose on and sell the facility and farm. The Borgeses filed for Chapter 11 relief on June 1, 2010, and removed the state foreclosure action to the bankruptcy court (the "Foreclosure Action").[5] The Borgeses then filed an adversary proceeding against AGNM to avoid its liens on the 220 acres and the water rights (the "Avoidance Action"),[6] and another proceeding, against AGNM and CWT, to turn over the CWT proceeds (the "Turnover Action").[7] In August 2011, CWT deposited slightly over $4 million into the bankruptcy court's registry.[8]

The Borgeses also objected to AGNM's proofs of claim. The parties

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[4] Trial Ex. 263, CWT Letter dated Aug. 21, 2009, *in* Borgeses App. at 2443.

[5] Notice of Removal of State Court Action, *AGNM v. Borges (In re Borges)*, Adv. Case No. 10-1170, *in* Borgeses App. at 100-03.

[6] Debtors' Complaint to Determine the Validity and Extent of Liens, to Avoid Liens Claimed By [AGNM], To Avoid a Fraudulent Transfer and For Turnover, *Borges v. AGNM (In re Borges)*, Adv. No. 11-1012, *in* Borgeses App. 4818-25.

[7] *Borges v. AGNM (In re Borges)*, Adv. No. 11-1105 Docket, ECF No. 1 at 6-7, *in* Borgeses App. at 70-71.

[8] Clerk's Notice of Registry Deposit, *Borges v. AGNM (In re Borges)*, Adv. No. 11-1105 Docket, ECF No. 10, *in* Borgeses App. at 72.

stipulated to consolidating the foreclosure and avoidance proceedings.[9]

The bankruptcy court concluded, on summary judgment, that AGNM did have a security interest in the CWT funds, but because there was a genuine issue as to the amount of the debt, it declined to turn over the funds to AGNM at that time.[10] A trial commenced on May 21, 2012 and concluded on May 31, 2012 to resolve the issues raised in the adversaries and AGNM's proofs of claim in the main bankruptcy case. After the trial, the bankruptcy court issued its decision on December 31, 2012 (the "Judgment").[11]

Ultimately, the bankruptcy court allowed AGNM's proofs of claim and awarded it judgment on the notes subject to offsets for retroactive interest and application of its "Funds Held" account. It concluded that AGNM (specifically PCA) was entitled to the CWT proceeds. It also determined that AGNM had a valid lien on the real estate described in the 2006 Mortgage and could foreclose on that property, but not on the Additional 220 Acres as the Corrected Mortgage was void, thus, the added acreage could be avoided under 11 U.S.C. § 544(a)(3). It further held that AGNM had no interest in any water rights represented by the Change of Ownership of Water Rights documents recorded in the New Mexico State Engineer's Office (RA-1326, RA-1327, RA-1455, and RA-1094), and ordered the liens on these water rights avoided and preserved for the estate. Finally, it denied the Borges' counterclaims, concluding that AGNM's insistence on its contractual right to have all of the proceeds from the retirement of the herd

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[9] Stipulated Order Consolidating Adversary Proceedings, *in* Borgeses App. 433-35. For all intents and purposes, this meant all three adversaries were consolidated since the Turnover Action mirrored the Foreclosure Action's claim as to the CWT proceeds.

[10] Memorandum Opinion in Support of Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment, *in* Borgeses App. 436-57.

[11] Memorandum Opinion After Trial on the Merits In Support of Judgment and Award of Related Relief, *in* AGNM App. 428-537; Judgment, *in* AGNM App. 538-43.

was reasonable and that its actions were entirely justified under the circumstances.[12]

On January 22, 2013, after obtaining an extension, the Borgeses filed a motion for costs (the "Cost Motion"), stating they were the prevailing party on four issues: 1) the avoidance of the lien on the Additional 220 Acres; 2) the avoidance of AGNM's lien on the water rights, 3) the "Funds Held" account, and 4) the retroactive interest increase on the Cow Note. The Borgeses sought an award of $21,185.02 for costs relating to photocopying, subpoena and witness fees, travel, and transcripts.

On May 2, 2013, the bankruptcy court denied the motion for costs ("Order Denying Costs") for two reasons: 1) there was nothing in the record and no findings by the prior trial judge that AGNM engaged in any type of behavior that would justify awarding cost against it, and 2) the Borgeses were not the prevailing parties. The Borgeses appeal the Order Denying Costs.

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[13] The Borgeses timely filed their notice of appeal from the bankruptcy court's final order and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of New Mexico.[14]

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[12] Technically, the Borges' breach of contract counterclaim was granted in part, but relief was granted by reducing accrued interest included in AGNM's proof of claim on the Cow Note.

[13] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[14] *United States v. Ariz. Canning Co.*, 212 F.2d 532, 534 (10th Cir. 1954) (continued...)

III. Discussion

In these appeals, the Borgeses argue that the bankruptcy court erred in denying the Cost Motion because it 1) prematurely ruled on the Motion, 2) limited its discretion to award costs by requiring bad faith on the part of the nonprevailing party, and 3) erroneously concluded they were not the prevailing party. They ask this Court to reverse the Order Denying Costs. Alternatively, they request this Court remand the costs issues to the bankruptcy court for a determination after the Merit Appeals are resolved.

A. Costs in General

Rule 7054(b) of the Federal Rules of Bankruptcy Procedure governs the award of costs to a prevailing party in an adversary proceeding. It provides, in pertinent part, that "[t]he court *may* allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides."[15] An award of prevailing party costs involves two separate inquiries: first, who is the "prevailing party;" and second, how much, if any, costs should be awarded to the prevailing party.[16] By comparison, Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that ". . . costs–other than attorney's fees–*should be* allowed to the prevailing party."[17]

As the permissive language of Rule 7054(b) suggests, whether to award costs is within the sound discretion of the bankruptcy court, unlike in other

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[14] (...continued)
(recognizing general rule that an appeal does not lie from a decree solely for costs, but holding general rule inapplicable when the power of the court to assess the costs is at issue). *But see* 54 A.L.R.2d 927 § 2 ("Whether a judgment which is in form solely for costs supports an appeal brought for the purpose of reviewing the merits of the controversy is a question on which the authorities are not in agreement.").

[15] Fed. R. Bankr. P. 7054(b) (emphasis added).

[16] *Shum v. Intel Corp.*, 629 F.3d 1360 (Fed. Cir. 2010).

[17] Fed. R. Civ. P. 54(d)(1) (emphasis added).

federal civil cases.[18] Rule 7054(b) omits the presumptive language favoring the award of costs to prevailing parties that Rule 54(d)(1) contains.[19] We therefore review the allowance or disallowance of costs for abuse of discretion.[20]

B. The bankruptcy court's denial of the Costs Motion was not premature.

The Borgeses argue that the bankruptcy court's conclusion that they were not the prevailing party was premature because it was based on findings and conclusions which they have appealed. They say the bankruptcy court should have refrained from ruling on the Costs Motion until after the Merit Appeals were resolved because if they win those appeals, they are the prevailing parties.[21] While the bankruptcy court could have waited to rule on the Costs Motion, there is no rule against doing so. Even though the Merit Appeals were pending, the bankruptcy court retains jurisdiction to entertain and resolve a motion for costs under Bankruptcy Rule 7054.[22] Thus, the Order Denying Costs was not

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[18] *In re Aviva Gelato, Inc.*, 94 B.R. 622, 624 (9th Cir. BAP 1988), *aff'd*, 930 F.2d 26 (9th Cir. 1991); *D&B Countryside, L.L.C. v. Newell (In re D&B Countryside, L.L.C.)*, 217 B.R. 72, 75 (Bankr. E.D. Va. 1998); *Turner v. Davis, Gillenwater & Lynch (In re the Inv. Bankers, Inc.*, 135 B.R. 659, 670 (Bankr. D. Colo. 1991).

[19] *Compare* Fed. R. Bankr. P. 7054(b), *with* Fed. R. Civ. P. 54(d)(1) (costs other than attorney's fees should be allowed to the prevailing party). *See In re D&B Countryside, L.L.C.*, 217 B.R. at 75 (noting significant difference between these two rules); *In re the Inv. Bankers, Inc.*, 135 B.R. at 670 (same).

[20] *In re Fordu*, 201 F.3d 693, 696 n.1 (6th Cir. 1999).

[21] The Borgeses cited *Evans v. Dunston (In re Dunston)*, 146 B.R. 269 (D. Colo. 1992), *Seaver v. Klein-Swanson (In re Klein-Swanson)*, 488 B.R. 628 (8th Cir. BAP 2013), and *Mungo v. Taylor*, 355 F.3d 969 (7th Cir. 2004) to support this argument. All three cases, however, are factually distinguishable. They also do not say that a bankruptcy court cannot rule on a motion for costs if there is a pending appeal of the underlying judgment. They simply stand for the proposition that a complete reversal of the underlying judgment in favor of the movant may warrant reversal of an award for costs. In any case, our decision in the Merit Appeals renders this argument moot.

[22] *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988) (concluding that a Rule 54(d) motion for costs raises issues wholly collateral to the judgment in the

(continued...)

premature.

C. The bankruptcy court did not err in concluding the Borgeses were not the prevailing parties.[23]

The Borgeses argue that the bankruptcy court erred in concluding they were not the prevailing parties because: 1) it disregarded the scope of their success as to their avoidance claims and breach of contract claims, 2) its analysis of relevant Tenth Circuit law on award of costs was incomplete; and 3) it failed to analyze whether more than one party could recover costs in this case.[24] We find these arguments unpersuasive.

The Borgeses are correct that they prevailed on certain claims. But just because a party can be said to have prevailed on a claim does not necessarily make it ***the*** prevailing party.[25] The Borgeses suggest that the bankruptcy court's reliance upon *Barber* for the rule that "there can only be one prevailing party" is misplaced because it dealt with Rule 54(d), not Rule 7054. We find the bankruptcy court's reliance on *Barber* proper in this case because both rules use the definite article "the" in referring to "the prevailing party" and the operative term, "the prevailing party," is singular. The plain language of Rule 7054 unambiguously limits the number of prevailing parties in a given case to one party.

Here, the adversaries were consolidated for trial. Multiple issues and claims were tried. The bankruptcy court looked at the case as a whole as

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[22] (...continued)
main cause of action); *Roth v. Mims*, 298 B.R. 272, 299 (N.D. Tex. 2003).

[23] Determination of the prevailing party is a question of law reviewed *de novo*. *Inland Steel Co. v. LTV Steel Co.*, 364 F.3d 1318, 1320 (Fed. Cir. 2004); *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 100 (2d Cir. 2006) (per curiam).

[24] Borgeses' Brief at 18-19, 21.

[25] *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223 (10th Cir. 2001) (there can be only one prevailing party).

evidenced by its use of the term "overall" in its conclusion that AGNM was the prevailing party. We find no error in the bankruptcy court's "prevailing party" analysis.

D. The bankruptcy court did not abuse its discretion in denying the Costs Motion.

In any case, even if the Borgeses were ***the*** prevailing parties, that does not mean they are entitled to an award of costs. Prevailing party status qualifies a party for an award of costs, but bankruptcy courts nonetheless retain broad discretion as to whether to award the prevailing party costs.

The Borgeses claim that the bankruptcy court impermissibly limited its discretion to award costs when it stated that "[it] will award prevailing party costs only if there is some reason that tips the scales toward the prevailing party other than simply the fact that that side won."[26] We reject this argument. A court's discretion includes deciding which grounds or factors to consider in making that decision. Although there may be no general rule requiring a finding of bad faith on the part of the nonprevailing party in order to award costs, it is within the bounds of permissible choice for the court to consider the presence or absence of bad faith or conduct as a determinative factor.

We also reject the Borgeses' arguments that the bankruptcy court erred in finding AGNM acted reasonably under the circumstances and did not engage in any bad faith conduct. These arguments mirror those advanced in the Merit Appeals. We already addressed them in the Merit Appeals and decline to do so again. We incorporate our decision in the Merit Appeals and affirm the bankruptcy court's finding that AGNM has not engaged in any type of behavior that would warrant awarding costs against them.

AGNM filed a meritorious foreclosure action and the Borgeses filed a

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[26] Brief of Borgeses at 26 (quoting Order Denying Costs at 4-5, *in* Borgeses Supp. App. at 4954-55).

meritorious avoidance action. Both parties vigorously defended their positions. Under these circumstances, we cannot hold that the bankruptcy court abused its discretion in denying costs.

IV. Conclusion

The bankruptcy court acted within the perimeters of the law and did not abuse its discretion in denying costs to the Borgeses. We AFFIRM the Order Denying Costs.