

AUG 01 2012

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-11-1549-PaJuH
)	
AMERICAN WAGERING, INC.,)	Bankr. No. 03-52529-GWZ
)	
Debtor.)	Adv. Proc. 05-05037-GWZ
_____)	
)	
MICHAEL RACUSIN, dba M. RACUSIN &)	
COMPANY,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
AMERICAN WAGERING, INC.;)	
LEROY'S HORSE & SPORTS PLACE,)	
)	
Appellees.)	
_____)	

Argued and Submitted on July 20, 2012,
at Pasadena, California

Filed - August 1, 2012

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: Samuel A. Schwartz, Esq. argued for appellant
Michael Racusin; Matthew C. Zirzow, Esq. of Gordon
& Silver, Ltd. argued for appellees American
Wagering, Inc. and Leroy's Horse and Sports Place.

Before: PAPPAS, JURY and HOLLOWELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Michael Racusin appeals the bankruptcy court's grant of
2 partial summary judgment to chapter 11² debtors American Wagering,
3 Inc. ("AWI") and Leroy's Horse and Sports Place ("Leroy's"). We
4 AFFIRM.

5 I. FACTS

6 The Pre-bankruptcy Litigation

7 In 1994, Leroy's, a company which provides facilities within
8 Nevada casinos where bets may be placed on horse racing events,
9 was preparing an initial public offering ("IPO") of its stock. In
10 contemplation of the IPO, Leroy's formed and became a subsidiary
11 of AWI, which would be the publicly owned entity after the IPO.³
12 AWI hired Racusin as its financial advisor in connection with the
13 IPO. AWI and Racusin entered into an agreement on November 11,
14 1994, that provided in relevant part:

15 Michael Racusin has been our financial advisor for the
16 purpose of an initial public offering by Rodman and
17 Renshaw, Inc., Equity Securities Trading Co., Inc., or
18 Orida Capital International, Ltd. As compensation he
would be paid 4½% of the final evaluation in the form of
Leroy's common stock and \$150,000 cash upon completion
of common offering or IPO.

19 Quoted in Racusin v. Am. Wagering, Inc. (In re Am. Wagering,
20 Inc.), 493 F.3d 1067, 1069 (9th Cir. 2006).

21 Two years later, in 1996, while the IPO was pending, AWI sued
22

23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
25 enacted and promulgated prior to the effective date (October 17,
26 2005) of the relevant provisions of the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
28 Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil
Procedure are referred to as "Civil Rules."

³ Because the corporate relationship of Leroy's and AWI is
not relevant in this appeal, we will refer to both debtors as AWI.

1 Racusin in Nevada state court, seeking a determination that the
2 November 11, 1994 agreement between AWI and Racusin was
3 unenforceable. Racusin removed the action to the U.S. District
4 Court for the District of Nevada and asserted a counterclaim for
5 breach of contract and other relief. In September 1997, after a
6 bench trial, the district court entered judgment in favor of
7 Racusin against AWI for \$732,972. Racusin appealed the judgment,
8 arguing that he was entitled to a jury trial. The Ninth Circuit,
9 agreeing with Racusin, reversed the district court's judgment and
10 remanded. Leroy's Horse and Sports Place v. Racusin, 182 F.3d 926
11 (table) (9th Cir. 1999). On remand, a jury determined that
12 Racusin was entitled to recover "stock in Leroy's . . . in an
13 amount equal to 4.5% of \$45,000,000 [the final valuation of the
14 common stock] and \$150,000 in cash." Based on the jury's finding,
15 the district court awarded Racusin 337,500 shares of Leroy's
16 stock. In re Am. Wagering, Inc., 493 F.3d at 1070.

17 Racusin appealed again, contending that the district court
18 erred by awarding him stock when he had requested only monetary
19 damages. The Ninth Circuit again held in Racusin's favor, and
20 remanded the action to the district court with instructions that
21 it calculate the value of 337,500 shares and enter a money award
22 to Racusin. Leroy's Horse & Sports Place v. Racusin, 21 Fed.
23 Appx. 716 (9th Cir. 2001). On remand, on July 8, 2003, the
24 district court awarded Racusin money damages of \$150,000 plus
25 \$2,160,000, representing the value of the stock when Racusin could
26 have first legally sold his shares. Leroy's Horse and Sports
27 Place v. Racusin, CV-S-95-00927 (D. Nev. 2003) (the "Initial
28 Interest Judgment").

1 On September 3, 2004, AWI and Racusin entered into a
2 settlement agreement resolving certain aspects of their disputes
3 (the "Settlement Agreement"). After a hearing, the bankruptcy
4 court approved the Settlement Agreement by order entered on
5 October 24, 2004.

6 Several provisions of the Settlement Agreement are critical
7 in this appeal. These include:

8 [AWI agrees that] it will not appeal the decision in the
9 BAP Appeal and will accept the BAP Appeal decision as
10 final; Racusin shall retain the right to appeal the
11 decision in the BAP Appeal. In the event Racusin
12 appeals the BAP Appeal, the Amortization Schedules
13 attached to this Agreement shall apply to any amounts
14 due Racusin as a result of winning such appeal. The
15 Parties agree that neither will appeal the decision of
16 the [Ninth Circuit Interest Appeal], and they will
17 accept the [Ninth Circuit Interest Appeal] decision as
18 final.

14 Settlement Agreement, § III(4).

15 In the event that Racusin wins the [Ninth Circuit
16 Interest Appeal] and wins the BAP Appeal, then the
17 Allowed Racusin Claim shall be the lesser of the amount
18 awarded by the 9th Circuit or \$2,800,000.00 less any
19 amounts paid Hartunian pursuant to the Hartunian appeals
20 as of the Effective Date of the Restated Amended Plan.
21 The Allowed Racusin Claim shall be paid to Racusin in
22 accordance with Amortization Schedule #2 (attached
23 hereto and incorporated herein) in full satisfaction and
24 release of the Allowed Racusin Claim. The balance shall
25 bear interest at the rate of eight percent (8%) per year
26 until paid in full and the initial payment shall be made
27 on the Effective Date of the Restated Amended Plan.

22 Settlement Agreement, § III(7).

23 In the event that Racusin wins the [Ninth Circuit
24 Interest Appeal] and loses the BAP Appeal, then the
25 Allowed Racusin Claim shall be 250,000 shares of AWI
26 common stock in full satisfaction and release of the
27 Racusin Claim.

26 Settlement Agreement, § III(8).

27 On January 14, 2005, the Court of Appeals decided the Ninth
28 Circuit Interest Appeal in Racusin's favor and awarded Racusin

1 prejudgment interest, which it calculated as \$1,383,036.15.

2 Hartunian v. Racusin, 120 Fed. Appx. 698, 704 (9th Cir. 2005).⁴

3 It is undisputed by the parties that Racusin "won" the Ninth
4 Circuit Interest Appeal for purposes of the Settlement Agreement.

5 On February 28, 2005, the bankruptcy court confirmed AWI's
6 unopposed Restated Amended Joint Plan of Reorganization (the
7 "Plan"). The Plan's effective date was March 11, 2005. The Plan
8 did not alter the parties' rights under the Settlement Agreement.

9 The Panel entered a decision in the BAP Appeal on April 14,
10 2005 (the "BAP Subordination Order"). Am. Wagering, Inc. v.
11 Racusin (In re Am. Wagering, Inc.), 326 B.R. 449 (9th Cir. BAP
12 2005). The BAP reversed the bankruptcy court's Subordination
13 Order, deciding that the Racusin Claim should be subordinated
14 pursuant to § 510(b). While Racusin appealed the BAP
15 Subordination Order to the Ninth Circuit (the "Ninth Circuit
16 Subordination Appeal"), he never sought a stay of the BAP
17 Subordination Order in the BAP or the Ninth Circuit.

18 **The Interpleader Action**

19 AWI filed a Complaint in Interpleader (the "Interpleader
20 Action") in the bankruptcy court on May 13, 2005, commencing the
21 adversary proceeding from which this appeal originates. AWI
22 sought an order pursuant to Rule 7022 against Racusin and his
23 attorneys Aram Hartunian ("Hartunian"), Vincent Schettler
24 ("Schettler"), and Lionel Sawyer & Collins ("LS&C"), resolving
25 their conflicting claims and liens asserted against the Racusin

26
27 ⁴ In addition to the prejudgment interest dispute, the Ninth
28 Circuit in Hartunian also resolved a fee dispute between Racusin
and one of his attorneys, Hartunian. That dispute is not relevant
in this appeal.

1 Claim in the bankruptcy case. On June 16, 2005, Racusin moved to
2 stay the Interpleader Action pending outcome of his appeal to the
3 Ninth Circuit of the BAP Appeal (the "Interpleader Stay Motion").
4 AWI filed a motion on July 12, 2005 for an order allowing it to
5 deposit 250,000 shares of AWI stock with the bankruptcy court
6 clerk pursuant to Rule 7067 (the "Interpleader Motion"). AWI
7 argued that § III(8) of the Settlement Agreement had been
8 triggered by Racusin's victory in the Ninth Circuit Interest
9 appeal and loss in the BAP Appeal, and that under the Settlement
10 Agreement, AWI's tender of the 250,000 shares would satisfy the
11 Racusin Claim in full.

12 The bankruptcy court held a hearing on the Interpleader
13 Motion on July 27, 2005. Racusin did not object to AWI's request
14 to interplead the stock, nor was the question raised at that time
15 about Racusin's right to receive interest payments on the Racusin
16 Claim while the stock was in the court registry. The court
17 entered an order on the Interpleader Motion on August 2, 2005,
18 that provided:

19 IT IS HEREBY ORDERED that the American Wagering Common
20 Stock Certificate No. AW 0262 shall be turned over to
21 and deposited with the Clerk of the Court, subject to
22 further order of the Court that in the event the BAP
23 order is reversed on appeal, the stock shall be
24 withdrawn and substituted with cash pursuant to the
25 amortization schedule set forth in the Settlement
26 Agreement and the Confirmed Plan.

27 AWI delivered the stock certificate to the clerk of the bankruptcy
28 court on August 5, 2005.

A hearing on Racusin's Interpleader Stay Motion was held on
August 24, 2005. There was no discussion in the pleadings or at
the hearing regarding any interest payments to Racusin while the

1 action was pending. With no significant opposition to the motion
2 voiced, the bankruptcy court entered its order granting Racusin's
3 motion to stay the interpleader proceedings, pending the decision
4 of the Ninth Circuit on appeal of the BAP Appeal, on August 31,
5 2005.

6 **The Ninth Circuit Subordination Judgment**

7 The Ninth Circuit entered its first opinion concerning the
8 BAP Subordination Order on October 6, 2006. Racusin v. Am.
9 Wagering, Inc. (In re Am. Wagering, Inc.) 465 F.3d 1048 (9th Cir.
10 2006). It reversed the BAP Subordination Order, holding that
11 Racusin was indeed a creditor of AWI, rather than an investor, and
12 so his claim should not be subordinated in the bankruptcy case
13 pursuant to § 510(b). After AWI requested rehearing, the
14 October 6 opinion was withdrawn and superseded by an opinion filed
15 June 28, 2007. Racusin v. Am. Wagering, Inc. (In re Am. Wagering,
16 Inc.), 493 F.3d 1067 (9th Cir. 2007) (the "Ninth Circuit
17 Subordination Judgment"). The superseding opinion did not alter
18 the original decision's determination that Racusin's claim could
19 not be subordinated.

20 On July 17, 2007, AWI filed its Motion for Return of
21 Deposited Shares of Stock and to Authorize Deposit of Funds
22 Pursuant to [Rule] 7067 (the "7067 Motion") in the Interpleader
23 Action. Attached to the 7067 Motion was a revised amortization
24 schedule detailing the payment of the Racusin Claim originally
25 approved in the Plan (the "7067 Amortization"). Among its
26 provisions, the 7067 Amortization specified that interest on the
27 Racusin Claim would accrue at a rate of 8 percent per annum,
28 beginning on the Plan's Effective Date of March 11, 2005 through

1 July 31, 2007. It is noteworthy that this time period would
2 include the time from deposit of the stock in the court's registry
3 (August 2, 2005) through entry of the Ninth Circuit Subordination
4 Judgment on June 28, 2007 (the "Gap Period").

5 On July 18, 2007, Racusin filed a motion to enforce
6 Settlement Agreement § III(7) under Rule 9019, based on the
7 argument that both the Ninth Circuit Interest Appeal and the Ninth
8 Circuit's reversal of the BAP Appeal had been decided in Racusin's
9 favor (the "9019 Motion").

10 The bankruptcy court conducted a hearing on both the 7067
11 Motion and the 9019 Motion (and related matters) on November 2,
12 2007.⁵ AWI was represented by counsel and Racusin appeared pro
13 se. The court denied the 9019 Motion without prejudice, observing
14 numerous legal and technical errors in the pleading. The court
15 memorialized this ruling by order entered November 5, 2007 (the
16 "Deposit Order").

17 In the Deposit Order, the court also denied the 7067 Motion
18 because the Interpleader Order entered in 2005 had provided for
19 replacement of the stock with cash if the Ninth Circuit reversed
20 the BAP Subordination Order, and thus the 7067 Motion was
21 unnecessary. However, the court accepted the 7067 Amortization
22 schedule, and directed AWI to replace the stock in the registry
23 with cash consistent with the 7067 Amortization schedule, and to
24 continue payments into the registry consistent with that schedule.
25 The 7067 Amortization schedule included interest in the Gap

26
27 ⁵ Up to this point, the Honorable Bert Goldwater had
28 presided over this bankruptcy case and related adversary
proceedings. From this point on, the case was assigned to the
Honorable Gregg W. Zive.

1 Period. AWI deposited the sum required by the bankruptcy court in
2 the registry and received the stock certificate back on
3 November 6, 2007.

4 Then, on March 17, 2008, AWI submitted a corrected
5 amortization schedule (the "Corrected Amortization"). The
6 principal difference between the 7067 Amortization and the
7 Corrected Amortization is that the latter commenced accruing
8 interest on Racusin's Claim on July 26, 2007, that is, after the
9 Gap Period.

10 Racusin filed a Counterclaim against AWI in the Interpleader
11 Action on January 14, 2009. Racusin argued that AWI had breached
12 the Settlement Agreement by failing to make payments to him
13 according to the original 7067 Amortization schedule.

14 Racusin elaborated on this counterclaim in a Motion for
15 Summary Judgment on February 24, 2009, generally arguing that AWI
16 breached its payment obligations under the 7067 Amortization
17 schedule when it sponsored the later Corrected Amortization
18 schedule. According to Racusin, the Corrected Amortization began
19 accruing interest on July 26, 2007, whereas the 7067 Amortization
20 schedule included interest from 2005, including the Gap Period.
21 Eliminating the Gap Period interest, as well as a dispute
22 regarding the applicable interest rate, resulted in a shortfall in
23 AWI's payments to the interpleader registry account.

24 AWI filed a response to the summary judgment motion on
25 March 16, 2009, generally denying the allegations in the
26 counterclaim. On March 30, 2009, Racusin filed his Reply to
27 AWI's opposition, attaching an amended calculation of damages from
28 AWI's alleged breach.

1 The bankruptcy court hearing on Racusin's summary judgment
2 motion occurred on May 8, 2009. After arguments by counsel for
3 the parties, the court announced its ruling on the record,
4 granting Racusin's motion for summary judgment and accepting his
5 calculation of damages which included interest during the GAP
6 Period. The court entered its order granting partial summary
7 judgment on August 18, 2009 (the "First Summary Judgment Order").
8 However, the court did not at that time certify the finality of
9 the order under Civil Rule 54(b).

10 AWI sought relief from, or reconsideration of, the First
11 Summary Judgment Order on January 25, 2010. AWI asked the court
12 to employ its inherent powers, or to act under Civil Rule 54(b),
13 to review the First Summary Judgment Order because it was not a
14 final judgment. AWI further alleged that there were several
15 errors in the judgment, including that Racusin had incorrectly
16 formulated the beginning balance of the claim and that under law
17 no interest may accrue on the stock it interpleaded.

18 At a hearing on AWI's motion for relief or reconsideration,
19 on April 2, 2010, after hearing from counsel, the bankruptcy court
20 recited findings of fact and conclusions of law on the record,
21 which were later memorialized in written findings and conclusions
22 entered on December 23, 2010. The court vacated its First Summary
23 Judgment Order because, at the time of entry of that order, there
24 were, among other disputes, several disputed material issues of
25 fact: (1) the court had not made a determination of the intent of
26 the parties whether interest accrued during the GAP Period;
27 (2) the court was not prepared to make a determination of the
28 correct interest rate, absent a counter-motion for summary

1 judgment from AWI.

2 AWI moved for summary judgment in the Interpleader Complaint
3 on April 20, 2011. AWI argued that Racusin was not entitled to
4 recover interest that accrued during the GAP Period. In its view,
5 disallowance of interest in the GAP Period meant that AWI had
6 satisfied its obligation to Racusin in full under the Settlement
7 Agreement. Racusin responded on June 24, 2011. He disputed AWI's
8 interpretation of the Settlement Agreement, again arguing that he
9 had won both the Ninth Circuit Interest Appeal and the Ninth
10 Circuit Subordination Judgment, and consequently, § III(7) of the
11 Settlement Agreement, rather than § III(8), controlled his right
12 to payment.

13 The hearing on AWI's summary judgment motion was held on
14 July 27, 2011. After hearing from counsel, the court stated its
15 findings and conclusions on the record, which were memorialized in
16 the findings and partial summary judgment order entered on
17 September 26, 2011. The findings include the following:

18 I have read the settlement agreement. BAP appeal refers
19 only to the appeal to the BAP and not to any subsequent
20 appeal. And that is my finding of an undisputed fact as
21 of this time, which is consistent with the arbitrator's
22 finding 3. And it can be the -- so far as I can
23 determine, the only possible interpretation based upon
24 various provisions in the settlement agreement. So
25 that's taken care of.

26 Hr'g Tr. 10:20-21, July 27, 2011. The court's comments were
27 memorialized in its written findings of fact:

28 The term "BAP Appeal" as used in the Settlement
Agreement refers only to an appeal from the Bankruptcy
Court's 510(b) decision before the BAP on that issue and
not any further appeal of that issue or the BAP's
decision to the Ninth Circuit. This interpretation of
the Settlement Agreement is also consistent with the
interpretation given in the Arbitration Award,

1 pp. 17-21.⁶

2 Finding of Fact 11, September 26, 2011. Other findings relevant
3 in this appeal are:

4 Article III, Paragraph 8 is one of the operative
5 paragraphs in the Settlement Agreement because Racusin
6 won the [Ninth Circuit Interest Appeal] but lost the BAP
7 Appeal (as those terms are used in the Settlement
8 Agreement). Racusin could not have made a demand for
9 payment of cash prior to the Ninth Circuit Subordination
10 Decision, however, because the Settlement Agreement did
11 not provide for any cash payment during that time.

12 Finding of Fact 12.

13 Racusin did not seek a stay of the decision [in the BAP
14 Appeal] pending his appeal of this decision to the Ninth
15 Circuit, and thus the BAP's decision was unstayed and
16 effective.

17 Finding of Fact 13.

18 The Debtors' Stock Deposit in the Court Registry was a
19 tender of performance of their obligations under the
20 Settlement Agreement and therefore interest does not
21 accrue during the time the stock was on deposit.
22 Interest also does not accrue during the time the stock
23 was on deposit pursuant to the law of deposit per [Civil
24 Rule 67], the law of interpleader, and as a matter of
25 equity because Racusin sought and obtained the Stay
26 Order.

27 ⁶ The arbitration award referred to by the court resulted
28 from proceedings undertaken to resolve the dispute between Racusin
and his attorneys, LS&C, regarding LS&C's lien asserted on the
Racusin Claim for legal services. The arbitration proceedings
extended over four years and required numerous hearings. A copy
of the Arbitration Award was entered in the record of the
adversary proceeding. The Arbitration Award specifically
addressed whether interest was payable during the GAP Period and,
consequently, whether a portion of that interest would be payable
to LS&C. The arbitrators ruled that the Settlement Agreement did
not allow interest payments during the GAP Period.

The bankruptcy court did not rely on the Arbitration Award in
making its decision; indeed, the court stated that it did not
examine the award before forming its tentative conclusions.
Instead, the court was observing that its findings were consistent
with the extensive findings of the arbitration panel considering
the same issue.

1 Finding of Fact 16.

2 In light of the ruling not allowing interest during the
3 Gap Period, and taking into account the payments the
4 Debtors have already made, the Debtors paid their
5 obligations in full under the Settlement Agreement and
6 have no obligation to make any further payments into the
7 Court Registry.

6 Finding of Fact 18.

7 Based on these findings and conclusions, on September 26,
8 2011, the court entered the Partial Summary Judgment in the
9 Interpleader Adversary Proceeding. The court withheld final
10 summary judgment because there was an open question whether AWI
11 may have overpaid funds into the Court Registry. The court
12 certified its Partial Summary Judgment as final under Civil
13 Rule 54(b) as to all matters in the adversary proceeding except
14 the question of overpaid funds.

15 Racusin filed a timely appeal of the Partial Summary Judgment
16 on October 7, 2011.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 §§ 1334(b) and 157(b)(2)(A) and (O). The Panel has jurisdiction
20 under 28 U.S.C. §§ 158(a)(3) and (b).

21 **III. ISSUE**

22 Whether the bankruptcy court erred in its interpretation of
23 the Settlement Agreement that Racusin is not entitled to interest
24 on the Racusin Claim during the Gap Period.

25 **IV. STANDARDS OF REVIEW**

26 Under Nevada law, a court's interpretation of a contract is
27 reviewed de novo. Dobron v. Brunch, 215 P.3d 35, 37 (Nev. 2009).
28 The appellate courts will upset an essentially factual

1 determination made by a trial court in the course of
2 interpretation of a contract if, and only if, it is clearly
3 erroneous. Ah Moo v. A.G. Becker Paribas, Inc., 857 F.2d 615, 621
4 (9th Cir. 1988).

5 A bankruptcy court's decision to grant partial summary
6 judgment is reviewed de novo. White v. City of Sparks, 500 F.3d
7 953, 955 (9th Cir. 2007); Guerin v. Winston Industries, Inc.,
8 316 F.3d 879, 882 (9th Cir. 2002).

9 V. DISCUSSION

10 As can be seen from the recitation of the facts, this is the
11 latest contest between Racusin and AWI stemming from litigation in
12 the district and bankruptcy courts, and a long string of appeals
13 to this Panel and the Ninth Circuit. This appeal challenges the
14 bankruptcy court's interpretation of the Settlement Agreement and,
15 in particular, its interpretation of a critical term in that
16 agreement, the "BAP Appeal." Indeed, as counsel for Racusin
17 conceded at oral argument before the Panel, if the bankruptcy
18 court's interpretation of the term "BAP Appeal" was correct, then
19 his entry of partial summary judgment was correct.

20 Under Nevada law, a settlement agreement is a contract and
21 general rules of contract interpretation apply to the construction
22 of the terms used in the parties' Settlement Agreement. Jones v.
23 Suntrust Mortg., Inc., 274 P.3d 762, 764 (Nev. 2012); Kahn v.
24 Dodds (In re AMERCO Derivative Litig.), 252 P.3d 681, 693 (Nev.
25 2011) ("Because settlement agreements are contracts, they are
26 governed by principles of contract law. Under contract law
27 generally, when a [provision] is unambiguous, we must construe it
28 from the language contained within it."); Ringle v. Burton,

1 86 P.3d 1032, 1039 (Nev. 2004) (“[W]hen a contract is clear,
2 unambiguous, and complete, its terms must be given their plain
3 meaning and the contract must be enforced as written.”); Musser v.
4 Bank of Am., 964 P.2d 51, 54 (Nev. 1998) (“A basic rule of
5 contract interpretation is that every word must be given full
6 effect if at all possible.”).

7 When the parties to a contract “foresee a condition which may
8 develop and provide in their contract a remedy for the happening
9 of that condition, the presumption is that the parties intended
10 the prescribed remedy as the sole remedy for that condition.”
11 Gilman v. Gilman, 956 P.2d 761, 767 (Nev. 1998).

12 In this case, the terms of the Settlement Agreement
13 anticipated four conditions that might develop after the agreement
14 was entered and prescribed the form of compensation that Racusin
15 could recover from AWI as a result of the two pending appeals. As
16 the parties understood the circumstances: (1) Racusin could lose
17 the Ninth Circuit Interest Appeal and also lose the BAP Appeal;
18 (2) he could lose the Ninth Circuit Interest Appeal and win the
19 BAP Appeal; (3) he could win the Ninth Circuit Interest Appeal but
20 lose the BAP appeal; or (4) he could win the Ninth Circuit
21 Interest Appeal and also win the BAP Appeal. Of these conditional
22 provisions, the first two are not relevant because it is
23 undisputed that Racusin won the Ninth Circuit Interest Appeal. It
24 is only the two provisions that anticipated Racusin’s eventual
25 victory in the Ninth Circuit Interest Appeal that are implicated.
26 Under those provisions, if Racusin also won the BAP Appeal, he
27 would be compensated according to § III(7) of the Settlement
28 Agreement, which required a cash payment be made to him by AWI.

1 However, if Racusin lost the BAP Appeal, his right to compensation
2 was to take the form of stock, as provided in § III(8).
3 Therefore, the only factual question requiring resolution under
4 the Settlement Agreement's scheme for compensating Racusin was
5 whether he won or lost the BAP Appeal. To determine the answer to
6 this question, the bankruptcy court was required to decide whether
7 the term "BAP Appeal" as used in the Settlement Agreement was a
8 reference solely to the anticipated decision of the BAP, which
9 Racusin lost, or whether that term would also apply to the outcome
10 of his possible appeal of the BAP decision to the Ninth Circuit,
11 where Racusin prevailed.

12 In the Partial Summary Judgment, the order on appeal, the
13 bankruptcy court decided that the term "BAP Appeal" as used in the
14 Settlement Agreement was plain, and that it referred only to the
15 decision of the BAP, and not to any appeal of the BAP's decision:

16 I have read the settlement agreement. "BAP Appeal"
17 refers only to the appeal to the BAP and not to any
18 subsequent appeal. And that is my finding of an
19 undisputed fact as of this time. . . . And it can be
the - so far as I can determine, the only possible
interpretation based upon various provisions in the
settlement agreement.

20 Hr'g Tr. 10:20-21, July 27, 2011.

21 The bankruptcy court's ruling that "BAP Appeal" has but one
22 possible meaning, and thus is unambiguous and plain, is supported
23 by the record.

24 First of all, "BAP Appeal" is a defined term in the
25 Settlement Agreement: "[AWI] has appealed an adverse decision of
26 the Bankruptcy Court in the Bankruptcy Appellate Panel (the "BAP
27
28

1 Appeal")."⁷ Settlement Agreement, 4th WHEREAS clause, ¶ 2.
2 Thereafter, every time the Settlement Agreement refers to "BAP
3 Appeal," the reference is to the anticipated decision by the BAP.
4 In contrast, whenever the Settlement Agreement refers to appeals
5 other than the defined appeals, the Settlement Agreement employs a
6 lower case "a" to refer to the other appeals, thus distinguishing
7 them from the defined appeals.

8 The Settlement Agreement also refers to "pending the outcome
9 of the [BAP Appeal]." Settlement Agreement § 6. According to the
10 dictionaries, the plain meaning of "pending" is "not yet decided."
11 Random House Dictionary (2011); Merriam-Webster Collegiate
12 Dictionary (2004); Webster's Third New International Dictionary
13 (1981). Use of the term "pending" in this context can only refer
14 to the defined BAP Appeal; some later appeal, such as a not-yet-
15 existing appeal to the Ninth Circuit from the decision in the BAP
16 Appeal, cannot fairly be described as "not yet decided."

17 Racusin cites § III(4) to support his proposition that the
18 Settlement Agreement contemplated the possibility of an appeal of
19 the BAP's decision to the Ninth Circuit. He infers that this
20 provision therefore melds the Ninth Circuit Subordination Judgment
21 with the BAP Appeal. However, a close reading of the text of that
22 provision reveals that the Settlement Agreement carefully
23 distinguished by its terminology a possible Racusin appeal of the
24 decision to the Ninth Circuit from the decision in the "BAP
25

26 ⁷ Other defined appeals in the Settlement Agreement are: the
27 9th Circuit Appeal, Settlement Agreement § 1 (which we refer to in
28 this memorandum as the Ninth Circuit Interest Appeal to avoid
confusion) and the Hartunian Appeals, which were various appeals
of disputes between Racusin and one of his counsel, Hartunian.

1 Appeal": "[AWI agrees] that it would not appeal the decision in
2 the BAP Appeal and will accept the BAP Appeal decision as final;
3 Racusin shall retain the right to appeal the decision in the BAP
4 Appeal."

5 We agree with the bankruptcy court that, by assigning its
6 plain meaning, the term "BAP Appeal" as used by the parties in
7 their Settlement Agreement refers only to the decision of the BAP,
8 and not to any subsequent Racusin appeal from that decision. In
9 other words, the four conditional provisions in the Settlement
10 Agreement were inserted by the parties with the intent that they
11 operate only as the result of the outcomes of the Ninth Circuit
12 Interest Appeal and the BAP Appeal, and not to control if there
13 were further appeals of the BAP Appeal to the Ninth Circuit.

14 Having decided that BAP Appeal refers solely to the decision
15 in the pending BAP appeal, and by applying Nevada law on contract
16 construction, it follows that § III(8) of the Settlement
17 Agreement, and not § III(7), provides Racusin's sole remedy in the
18 event he won the Ninth Circuit Interest Appeal, but lost the BAP
19 Appeal. Section III(8) specifies that, given that outcome of the
20 appeals, Racusin is entitled to 250,000 shares of AWI stock, not
21 any cash payments with or without interest.⁸ It also then follows
22 that when AWI interpleaded the 250,000 shares of stock with the
23 clerk, AWI's obligations under the Settlement Agreement were
24 satisfied in full. As the bankruptcy court correctly determined,
25 the law of interpleader arrests the accrual of any interest on the
26

27 ⁸ That the 250,000 shares were later replaced with cash
28 under the terms of the Interpleader Order does not change the
non-interest bearing nature of the deposit during the Gap Period.

1 AWI obligation during the Gap Period. Transaero Land & Dev. Co.
2 v. Land Title of Nev., Inc., 842 P.2d 716, 719 (Nev. 1992)
3 (quoting Nevada's implementation of the Uniform Commercial Code,
4 NEV. REV. STAT. §104.3603(3)(2012) ("If tender of payment of an
5 account due on an instrument is made to a person entitled to
6 enforce the instrument, the obligation of the obligor to pay
7 interest after the due date on the amount tendered is
8 discharged")); 22 Williston on Contracts § 60:80 (4th ed. 2002)
9 ("A proper tender of payment discharges the obligation of the
10 obligor to pay interest after the due date on the amount
11 tendered."); see also Nichols v. Unum Life Ins. Co. of Am.,
12 287 F.Supp.2d 1088, 1091 (N.D. Cal. 2003)("the interpleading party
13 bears no liability for interest on the interpleaded fund after the
14 date that he pays the interpleaded fund into the court").

15 It should also be noted that the bankruptcy court was fully
16 aware of and intended the legal consequences of approving
17 interpleading the stock. As the court commented at the hearing
18 approving the Interpleader Order: "The debtor is protected from
19 the claims by doing what it is supposed to do, deposit in the
20 interpleader what is required by the final BAP decision." Hr'g
21 Tr. 33:3-5, July 27, 2005.

22 Racusin has argued that the bankruptcy court in the
23 Interpleader Order ruled that interest would accrue during the GAP
24 period if the Ninth Circuit reversed the BAP. We repeat here
25 Racusin's argument:

26 In fact, the Bankruptcy Court was well aware of the
27 parties Settlement Agreement, and while allowing the
28 Debtors to deposit the stock, Judge Goldwater had the
following language added to the [Interpleader Order]:

1 [I]n the event the BAP order is reversed on
2 appeal, the stock shall be withdrawn and
3 substituted with cash pursuant to the
4 amortization schedule set forth in the
5 Settlement Agreement and the Confirmed Plan.

6 Indeed, the Bankruptcy Court stated at the hearing that
7 Racusin would be entitled to the "accumulated
8 amortization."

9 Racusin's Op. Br. at 20 (internal citations omitted). However,
10 there are both technical and legal deficiencies in Racusin's
11 argument.

12 First, contrary to Racusin's implication that Judge Goldwater
13 intentionally modified the order to add the quoted language, that
14 language was the subject of an extended colloquy among the parties
15 and the court, and the specific language was agreed to by the
16 parties and the court at the hearing on the Interpleader Order.
17 Hr'g Tr. 33:11-34:11. It was corrected in the final order by a
18 handwritten interlineation.

19 Second, by beginning his quotation of the order with the
20 bracketed "[I]n", Racusin omits the critical introductory phrase,
21 "subject to further order of the court." That the parties and
22 court intended this phrase to apply to the part of the order
23 regarding the effect of reversal of the BAP Subordination Order is
24 apparent from the specific language agreed to in the hearing on
25 the Interpleader Motion:

26 SMITH [Racusin's Attorney]: So what I'm putting in is:

27 Subject to further order of the court that in
28 the event the BAP order is reversed on appeal
the stock shall be withdrawn and substituted
with cash

29 Hr'g Tr. 33: 11-14.

30 SMITH: . . .Pursuant to the amortization schedule set

1 forth . . . in the settlement agreement.

2 Id. at 34:9-11. Those are the precise words that appear in the
3 Interpleader Order at 2 (both typed and with the handwritten
4 interlineation).

5 And third, contrary to Racusin's assertion, the bankruptcy
6 court never stated at the hearing or elsewhere that Racusin was
7 "entitled to the 'accumulated amortization.'"

8 Besides these technical mistakes in its contention, Racusin's
9 argument, that the bankruptcy judge's order required that interest
10 would accrue during the GAP period if the Ninth Circuit reversed
11 the BAP, lacks legal merit. Even if the judge's ruling could be
12 interpreted that way, which we question, it was, by its terms and
13 legally, an interlocutory order. A court may review or reconsider
14 its interlocutory orders at any time. Noel v. Hall, 568 F.3d 743,
15 748 n.6 (9th Cir. 2009). Further evidencing that this was an
16 interlocutory order, the court's order was made expressly "subject
17 to further order of the court." That the "further order of the
18 court" was entered by a successor bankruptcy judge in the case is
19 of no moment. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528,
20 530 (9th Cir. 2000) (holding that a successor judge has
21 discretionary authority to review earlier interlocutory rulings
22 because a "second judge must conscientiously carry out his
23 judicial function in a case over which he is presiding").

24 In short, Racusin's argument is not persuasive. The language
25 in the Interpleader Order was an interlocutory attempt to
26 anticipate the possible consequences of future events. By its
27 terms, the court and parties agreed that it would be subject to

28

1 further review of the court.⁹ While the order was entered by Judge
2 Goldwater, as the successor judge, Judge Zive was not constrained
3 by the Interpleader Order.

4 Finally, once it concluded that § III(8) of the Settlement
5 Agreement controlled, the bankruptcy court correctly ruled that
6 AWI's obligation to Racusin under the Settlement Agreement was
7 fixed at 250,000 shares of stock, and the tender of those shares
8 in the interpleader action fully satisfied AWI's obligation to
9 Racusin. There remained at that point no further disputed issues
10 of material fact preventing entry of a partial summary judgment in
11 favor of AWI in the Interpleader Action, determining Racusin's
12 rights under the Settlement Agreement.¹⁰

13 VI. CONCLUSION

14 The bankruptcy court did not err in its interpretation of the
15 Settlement Agreement, or in its decision to grant partial summary
16 judgment in favor of AWI against Racusin. We AFFIRM that partial
17 summary judgment.

18

19

20

21

22

23

24 ⁹ The bankruptcy court also ruled that equitable
25 considerations prevented an award of interest to Racusin during
26 the GAP Period. Because we will affirm the bankruptcy court's
27 decision on legal grounds, the Panel does not reach the question
28 of the equitable grounds.

27 ¹⁰ Of course, the parties acknowledge that AWI's claim that
28 it overpaid into the interpleader remains to be resolved in the
bankruptcy court.