

JUL 31 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	OR-06-1041-KMaH
)		OR-06-1069-KMaH
DANIEL REEVES,)		(Consolidated)
)		
Debtor.)	Bk. No.	02-42183
)		
)	Adv. No.	05-03172
DANIEL REEVES,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
WASHINGTON MUTUAL BANK; JERRY)		
REEVES; J.C. REEVES CORP.,)		
)		
Appellees.)		
)		

Argued and Submitted on June 22, 2005
at Portland, Oregon

Filed - July 31, 2006

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

Honorable Elizabeth L. Perris, Chief Bankruptcy Judge, Presiding

Before: KLEIN, MARLAR, HOLLOWELL,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Hon. Eileen W. Hollowell, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 After the court confirmed debtor and appellant Daniel
2 Reeves' third amended chapter 11 plan, co-appellees Washington
3 Mutual Bank, Jerry Reeves, and J.C. Reeves Corporation, entered
4 into a settlement agreement that resolved, as among themselves,
5 certain construction defect claims that stemmed from the
6 construction of the debtor's residence.

7 The debtor, contending that his confirmed chapter 11 plan
8 gave him complete control over the construction defect dispute,
9 sued in bankruptcy court for a determination that the settlement
10 agreement among the co-appellees was "null and void."

11 The court entered summary judgment against the debtor
12 because the settlement did not affect the rights of the debtor in
13 the cause of action, the plan treated the Bank as unimpaired, and
14 there was no injunction that otherwise affected its independent
15 right to settle a cause of action with a third party. We AFFIRM.

16 17 FACTS

18 Debtor Daniel Reeves commenced this chapter 11 case in
19 November 2002. His interests in property included a cause of
20 action pending in an Oregon state court against Jerry Reeves and
21 J.C. Reeves Corporation ("Builder") for defects arising from the
22 construction of his residence. Case No. CCV9904624, Clackamas
23 County Superior Court.

24 The construction had been financed by Washington Mutual
25 Bank, F.A., fka Washington Mutual Bank ("Bank"), which loaned the
26 debtor \$975,000 and entered into a Custom Construction Loan
27 Agreement with the debtor and with Builder. The Bank filed a
28 proof of claim in the bankruptcy case for \$1,079,285.74.

1 Almost two years into the chapter 11 case, the chapter 11
2 trustee (who was appointed in November 2003) filed a notice of
3 intent to abandon real property, including the debtor's
4 residence, but not the state-court construction defect litigation
5 being prosecuted by debtor's counsel on behalf of the bankruptcy
6 estate. The notice explained: "That litigation, together with
7 any recovery therefrom, will remain part of the bankruptcy
8 estate." There was no notice of abandonment filed with the court
9 thereafter nor was there a court order abandoning the property.

10 A year later, on October 5, 2004, the debtor filed a
11 disclosure statement and a second amended plan of reorganization.
12 The court approved the disclosure statement two days later and
13 fixed a time for filing acceptances or rejections of the plan.

14 After Jerry Reeves and Builder filed an objection to the
15 second amended plan, the debtor filed a third amended plan.

16 Under the third amended plan, which was confirmed on
17 November 9, 2004, the Bank's claim was treated for the first time
18 as "unimpaired" and was classified as Class 4. Under Article 3,
19 "Treatment of Claims and Interests," the plan provided:

20 **3.2 Unimpaired Classes of Claims.**

21

22 **(d) Class 4: Secured Lender Claim of Washington Mutual.**

23 The legal, equitable and contractual rights of the Holder of
24 the Class 4 Claim are unaltered by this plan. The holder of
25 the Allowed Class 4 claim shall receive full repayment of
26 the indebtedness due the Holder of such Class 4 Claim
27 pursuant to the terms and conditions of the restructured
28 loans which form the subject of such Claims and shall retain
their secured position on the related Collateral unaffected.
Debtor and Washington Mutual are in the process of
negotiating the terms and conditions of a restructured loan
agreement. If Debtor and Washington Mutual Bank are able to
reach agreement, the loan agreement will be attached to this
Plan as **Exhibit 3.2(d)**. If Debtor and Washington Mutual

1 Bank are unable to reach an agreement, Debtor intends to
2 abandon the Collateral securing the Class 4 Claim. There is
3 sufficient equity in the Collateral securing the Class 4
4 Claim to pay the Class 4 Claim in full. In any event,
5 Washington Mutual has obtained relief from the automatic
6 stay and is proceeding with a non-judicial trust deed
7 foreclosure under which no deficiency is allowed pursuant to
8 ORS 86.770.

9 Third Amended Plan at 12 (emphasis added).

10 As to the construction defect claims, the plan
11 provided:

12 **10.4 Preservation of Rights of Action; Settlement of
13 Litigation claims.**

14 (a) **Preservation of Rights of Action.** Except as
15 otherwise provided in this Plan, the Confirmation
16 Order, or in any document, instrument, release, or
17 other agreement entered into in connection with this
18 Plan, in accordance with section 1123(b) of the Code,
19 the Debtor and Debtor's Estate shall retain the
20 Litigation Claim. The Debtor may enforce, sue on,
21 settle, or compromise (or decline to do any of the
22 foregoing) any or all of the Litigation Claims.

23 Third Amended Plan at 20.

24 Four months after plan confirmation, the Bank filed a
25 complaint in intervention in the state-court action against Dan
26 Reeves and Builder for declaratory relief and breach of contract.
27 Case No. CCV9904624.³

28 ³The complaint discussed the three-party Custom Construction
Loan Agreement that the parties had entered into concurrently
with the Bank extending the loan to the debtor and the debtor
executing the note and trust deed. The Bank's complaint
requested a judgment against the debtor and builder:

1. Declaring that Bank's rights to any proceeds recovered
by [debtor] against [Builder] are superior to [debtor] until
sufficient payments have been made to Bank from such
proceeds that Bank's security for its loan to [debtor] is
fully restored.

2. Awarding Bank damages sufficient to restore Reeves'
(continued...)

1 The debtor responded to the Bank's state-court complaint in
2 intervention by commencing an adversary proceeding in the
3 bankruptcy court to "obtain declaration of discharge and
4 injunctive relief" and seeking preliminary injunctive relief.
5 The debtor asked to have the Bank enjoined from asserting in the
6 state-court action claims for assignment of the defects recovery
7 and for the debtor's failure to correct the defects from his own
8 pocket.

9 Before the debtor's motion for a preliminary injunction was
10 heard, the Bank entered into a "Repair Agreement" with Jerry
11 Reeves and Builder wherein they settled all claims amongst the
12 three of them. Shortly thereafter, the Bank purchased the
13 debtor's residence at a foreclosure sale.

14 Under the Repair Agreement, which was premised on the
15 assumption that the Bank would purchase the debtor's residence at
16 the scheduled trustee's sale, Jerry Reeves and Builder agreed to
17 undertake remediation of the construction defects. The Bank,
18 Jerry Reeves, and Builder agreed to dismiss and release the
19 pending claims they had against each other. The Bank also was
20 dismissed from the state court case and no longer asserted claims
21 of any kind against the debtor. The Repair Agreement did not
22 attempt to settle any claims that the debtor had against the
23 Bank, Jerry Reeves, and Builder.

24 _____
25 ³(...continued)

26 property to the condition it would have been in had
27 [builder] and [debtor] performed the construction of the
28 residence in full accordance with the plans and
specifications, in the estimated sum of \$926,196.00, plus
prejudgment interest as alleged in Reeves' complaint herein.

Complaint at 6.

1 A month after the parties entered into the Repair Agreement,
2 the bankruptcy court granted the debtor's preliminary injunction
3 as it related to any claim by the Bank "seeking a money judgment
4 against Dan Reeves in the state court defect litigation" and
5 denied the remaining requests for preliminary injunction.

6 Thereafter, the Bank filed a motion to dismiss the adversary
7 complaint as moot, which the court granted, but also gave the
8 debtor ten days to replead and add a claim for interpretation of
9 the plan.

10 The debtor's amended complaint to obtain interpretation of
11 the plan was followed by cross-motions for summary judgment filed
12 by Bank and debtor.

13 The debtor's motion for summary judgment asked the court for
14 an interpretation of its confirmed third amended plan "as regards
15 its effects upon WAMU's claimed interest in the Construction
16 Defect Claims involved in one of the Litigation Claims."

17 The debtor argued that the Bank and Builder could not enter
18 into a Repair Agreement to settle the construction defect claim
19 because the debtor was the "only person with the power and the
20 right to settle/compromise those claims." As the Repair
21 Agreement was entered into without his participation, the debtor
22 contended that the Repair Agreement was void and had no effect
23 pursuant to the confirmed plan.

24 The debtor's theory on which this position was based was
25 that:

26 [The debtor] was revested with the Construction Defect
27 Claim, he received that property free and clear of any
28 interest, possessed the sole right to enforce, sue on,
settle or compromise that claim, WAMU's claim was limited to
either a restructured loan agreement or the abandoned real
property and improvements[.]

1 Memorandum in Support of Motion for Summary Judgment at 2.

2 The debtor argued that the construction defect claim
3 revested in him free of any interest of the Bank pursuant to 11
4 U.S.C. § 1141(c).

5 The debtor next argued that under the plan he received the
6 construction defects litigation claim and the Bank was limited to
7 either a reformed loan agreement or the abandoned real
8 property/improvements based on the language in the second amended
9 disclosure statement, the second amended plan, and the third
10 amended plan.

11 According to the debtor, the Bank was limited to either a
12 restructured loan or the real property/improvements because the
13 second amended disclosure statement provided:

14 Debtor and Washington Mutual are in the process of
15 negotiating the terms and conditions of a restructured loan
16 agreement. **If Debtor and Washington Mutual are unable to
17 reach an agreement, Debtor intends to abandon the collateral
18 securing the Class 4 Claim to pay the Class 4 Claim in full.
19 The collateral for this Claim is the real property and
20 improvements located at 22795 S.W. 55th Avenue, Tualatin,
21 Oregon.**

19 Second Amended Disclosure Statement, Section 5.7, impaired
20 classes of claims.

21 The debtor pointed to more language in the second and third
22 amended plans, which allegedly supported his position that the
23 Bank's collateral was described as real property and improvements
24 and why that somehow limited the Bank to choosing either real
25 property/improvements or a restructured loan, neither of which
26 included an interest in the construction defect litigation.⁴

27
28 ⁴While the debtor's motion for summary judgment attempted to
superficially harmonize the second amended plan and the confirmed
third amended plan, it did not address the fact that the second
(continued...)

1 Moreover, the debtor argued that the construction claim was
2 expressly listed as the debtor's litigation claim and the claim
3 of the Bank was discussed in terms of collateral. The debtor
4 reasoned the Bank was informed that the debtor retained the
5 construction defect claim and that the Bank's receipt of the real
6 property/improvements would release any other claim the Bank had
7 against the Construction Defect Claim, but chose not to object to
8 said language.

9 The Bank's motion for summary judgment asserted: (1) the
10 bank owned the property per the foreclosure and was free to
11 contract with anyone to perform repairs on its own property; (2)
12 the plain terms of the settlement agreement made no attempt to
13 settle or otherwise deal substantively with the debtor's claims
14 against Builder and Jerry; and (3) the Bank's settlement with
15 builder and Jerry was a settlement of its independent contractual
16 claims against builder.

17 The court held a hearing on the cross motions for summary
18 judgment on November 1, 2005, and granted summary judgment in
19 favor of the Bank. It made the following findings orally on the
20 record:

21 All right. The debtor asks for several things in the
22 debtor's motion for summary judgment. The debtor's asked
the Court for an interpretation of plaintiff's confirmed

23
24 ⁴(...continued)
amended plan treated the Bank as impaired and the confirmed plan
25 treated the Bank as unimpaired. Nor did the debtor speak to any
of the other differences in the plan provisions.

26 Moreover, unlike the disclosure statement, the second
27 amended plan and the third amended plan define collateral to mean
28 "any property or interest in property of the Debtor's Estate that
is subject to a valid and enforceable (a) lien; (b) security
interest; or (c) other charge against property; and which secures
a Claim."

1 plan as regards its effects upon WAMU's claimed security
2 interest in the construction defects claimed in one of the
3 litigation claims dealt with by the plan. I'm reading out
4 of your motion for summary judgment now, Mr. Yazbeck.

5 And you asked the Court to determine the - - under
6 plaintiff's confirmed plan Reeves retain the house case
7 claim for construc - - defective construction, and he
8 received it free and clear of security interest and
9 possesses the sole right to enforce, sue on, settle or
10 compromise the claim. While I certainly agree that the - -
11 under the plan, the debtor, Mr. Dan Reeves, retained the
12 house claim for constructive - - for defective construction
13 as his property, I find that that was not free of any
14 preexisting security interest of the - - of WAMU because
15 WAMU's claim was unimpaired under the plan.

16 I've read the plan in its totality, all the pertinent
17 provisions that you've cited to me, and I think it is just
18 as easily susceptible to the interpretation that the bank's
19 security interest was preserved.

20 The term "unimpaired" has legal significance in bankruptcy,
21 and I think that the debtor's counsel and the debtor knew
22 exactly what they were doing when they said the class of
23 claims was unimpaired. They used the language of the
24 statute: the legal, equitable and contractual rights of the
25 holder of the Class 4 claim are unaltered by the plan.
26 There's only one claim, and then there was a bundle of
27 security to go with that claim. And to take away part of
28 the bundle of security would be to impair the claim, to
alter the legal, equitable and contractual rights. And this
plan didn't do that.

So while I'm prepared to declare that Reeves retained the
house case, it's his to litigate in the state court, and the
state court apparently recognized that in some of the
rulings that the state court made, it's ultimately up to the
state court what that house case is - - value is, whether it
has merit, and what significance it has that there was a
security interest in that - - in that claim.

With respect to - - there's also agreement - - or there's
also a request that I declare that the debtor has the sole
right to enforce, sue on, settle and compromise the claim.
Well, to the extent the debtor ow[n]s the claim, even if
it's subject to a security interest, it would be the
debtor's to sue on, settle or compromise subject to whatever
the rights of the secured creditor would be.

The Bank's claim was not limited to a restructured loan
agreement or abandoned real property and improvements
stripped of the construction defect claim, because its legal
rights were - - and contractual rights were unaltered.
Furthermore, I find the argument that the bank, WAMU,
somehow lost its independent rights against J.C. Reeves and
Jerry Reeves under the construction contract to be without

1 merit. If a plan is going to affect independent rights
2 against a third party, that has to be done by injunction;
3 it has to be express; and the jurisdiction of the Court is
4 limited to do that. This plan did not none of those things.

5 I, likewise, will deny the request for summary judgment that
6 the repair agreement entered into between WAMU, Jerry Reeves
7 and J.C. Reeves Corporation is null and void. It isn't.
8 It's a settlement of their claims as against each other.
9 It's not a settlement of the debtor's claims. Those are the
10 debtor's to settle. I will grant WAMU's motion for summary
11 judgment.

12 I believe that this will dispose of this adversary
13 proceeding in its entirety.

14 Tr. 11/01/05 at 23-26.

15 An order was entered granting the Bank's motion for summary
16 judgment on November 15, 2005. Based on the order granting
17 summary judgment, the court entered a judgment in the adversary
18 proceeding dismissing the complaint with prejudice.

19 These two timely appeals ensued, which this court formally
20 consolidated by order entered March 13, 2006.⁵

21 JURISDICTION

22 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
23 We have jurisdiction under 28 U.S.C. § 158(a)(1).

24 STANDARD OF REVIEW

25 We review an order granting summary judgment de novo. Dias
26 v. Elique, 436 F.3d 1125, 1128 (9th Cir. 2006). We must

27 ⁵In addition to these two consolidated appeals (OR-06-1041
28 and OR-06-1069), two additional appeals arising from the same
bankruptcy case (OR-06-1070 and OR-06-1099) were separately
briefed and set for oral argument to coincide with argument in
the consolidated appeals. OR-06-1070 and OR-06-1099 have been
dismissed at the parties' request pursuant to Federal Rule of
Bankruptcy Procedure 8001(c)(2).

1 determine whether, viewing the evidence in the light most
2 favorable to the nonmoving party, there are any genuine issues of
3 material fact and whether the district court correctly applied
4 the relevant substantive law. Id.

5
6 ISSUES

7 1. Whether the appeal is moot.

8 2. Whether the rights of a creditor that was treated as
9 unimpaired under the confirmed plan were nevertheless altered by
10 plan confirmation.

11
12 DISCUSSION

13 The debtor spends a significant amount of time discussing
14 marginal issues that sidestep the fact that the Bank's claim was
15 unimpaired under the confirmed plan.

16
17 I

18 An appeal is moot if events have occurred after the entry of
19 the order being appealed that prevent an appellate court from
20 granting effective relief. Varela v. Dynamic Brokers (In re
21 Dynamic Brokers, Inc.), 293 B.R. 489, 493-94 (9th Cir. BAP 2003).
22 The Bank contends that the majority of Reeves' claims became moot
23 after the Bank completed its nonjudicial foreclosure sale which
24 thereby extinguished Reeves' interest in the residence. The Bank
25 questions how Reeves could claim "damages measured by the cost of
26 remedying a defect in a home" he no longer owns.

27 Whether Reeves has a claim for damages is a question that is
28 best decided in the pending state court litigation. Because this

1 appeal arguably could lead to a change in the status quo (by
2 unraveling the Bank and the Builder's settlement pursuant to the
3 confirmed plan), this appeal is not moot.

4
5 II

6 The debtor's argument primarily focuses on his contention
7 that the Bank could not enter into a settlement of the
8 construction defect claims with Jerry Reeves and Builder because,
9 not only was the debtor the only person with the authority to
10 settle those claims, the plan limited the Bank to either a
11 restructured loan agreement or real property/improvements.

12 The debtor's argument, however, is contradicted by the
13 provision in the debtor's confirmed plan that the Bank's claim
14 was unimpaired. The plan provided that "the legal, equitable and
15 contractual rights" of the Bank were "unaltered" by the plan.

16 As the bankruptcy court noted, the language in the debtor's
17 plan is taken directly from 11 U.S.C. § 1124(1) that provides
18 that a class is not impaired if the plan "leaves unaltered the
19 legal, equitable, and contractual rights to which such claim or
20 interest entitles the holder of such claim or interest." 11
21 U.S.C. § 1124(1).

22 Under § 1124, by definition, the plan had no effect of any
23 kind on the Bank's rights. Under the plan, the Bank retained the
24 right to exercise its rights under the construction loan
25 agreement, which it did by intervening in the state court action
26 and thereafter entering into a settlement of its independent
27 contractual claims against Jerry Reeves and Builder.

1 The fact that the Bank was unimpaired under the plan is, in
2 and of itself, powerful enough to eviscerate the debtor's
3 arguments that the plan somehow limited the Bank's rights to
4 settle with Jerry Reeves and Builder.⁶

5 Moreover, the Bank, Jerry Reeves and Builder settled as
6 among themselves, leaving the debtor to prosecute whatever causes
7 of action he had in state court. The settlement had no effect on
8 the rights of the debtor because, as a matter of law, the Bank,
9 Jerry and Builder could only settle amongst themselves that which
10 they owned. The court, thus, did not err in concluding that the
11 Bank, Jerry Reeves and Builder could enter into a settlement
12 amongst themselves.

14 ⁶Although there appears to be disagreement as to whether the
15 Bank's rights to enter into the settlement were part of the
16 security agreement or independent of it, at bottom, the Bank
retained all of its pre-bankruptcy rights intact under the plan.

17 The Bank argues that the entire issue of whether or not it
18 was impaired or unimpaired is of no moment. It contends that the
19 plan did not encompass its independent rights against Jerry
20 Reeves and Builder. It merely foreclosed on the property and
21 then dealt with that property as its owner. The Bank further
22 argues that all the litigation that preceded the foreclosure is
irrelevant because none of its claims against either Reeves or
Builder were ever litigated, and no court ever took action on
them.

23 Jerry Reeves contends that the Bank's security interest
included the Bank's rights under the construction contract.

24 The bankruptcy court discussed the preservation of the
25 bank's security interest which included one claim and "a bundle
26 of security to go with that claim." At bottom, not only was the
27 bank unimpaired under the plan, the plan specifically provided
28 that the bank had the right to foreclose: "Washington Mutual has
obtained relief from the automatic stay and is proceeding with a
non-judicial trust deed foreclosure[.]" That said, by having the
right to foreclose the bank acquired the full bundle of ownership
rights that came with the foreclosure.

1 The debtor's argument that the Bank somehow lost its
2 independent rights against Builder is, as the bankruptcy court
3 noted, without merit. A chapter 11 case could only affect
4 causes of actions between nondebtors if an injunction was entered
5 pursuant to 11 U.S.C. § 105 in an adversary proceeding governed
6 by Federal Rule of Bankruptcy Procedure 7001. And even under
7 § 105, a court lacks power to enjoin permanently, beyond
8 confirmation of a chapter 11 plan, a creditor from enforcing its
9 rights against a nondebtor. Am. Hardwoods, Inc. v. Deutsche
10 Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621, 626-27
11 (9th Cir. 1989).

12 As to the debtor's arguments based on the second amended
13 plan, which was not confirmed and which would have impaired the
14 Bank, they are inapposite. The subsequent third amended plan
15 changed the treatment of the Bank so as to leave it unimpaired.
16 If anything, the debtor sets himself up for judicial estoppel by
17 obtaining one benefit from the court (plan confirmation) on the
18 premise that the Bank was unimpaired, and then seeks a
19 contradictory benefit on the premise that the Bank gave up a
20 valuable right in connection with the plan confirmation. Alary
21 v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 566
22 (9th Cir. BAP 2002), citing New Hampshire v. Maine, 532 U.S. 742,
23 749-751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); Hamilton v.
24 State Farm Fire & Cas. Co., 270 F.3d 778, 782-85 (9th Cir.
25 2001) (other citations omitted).

26
27 CONCLUSION

28 For the foregoing reasons, we AFFIRM.