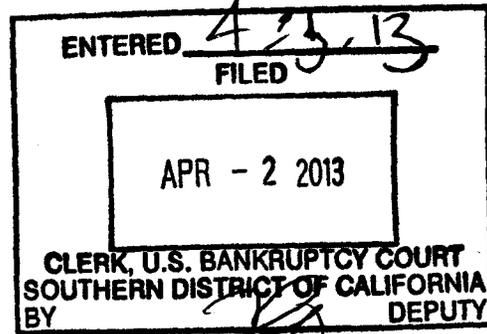


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re) Case No. 10-10860-PB11
12)
12 CAROL KARLOVICH,)
13)
13 Debtor.) ORDER ON MOTION FOR APPROVAL
14) OF ATTORNEYS' FEES AND
14) EXPENSES RELATED TO MOTION
15) TO COMPEL
15)

16 Creditor 2010-1 CRE Venture, LLC brought a "Motion to Compel
17 Enforcement of Plan of Reorganization and Stipulation." The
18 Stipulation referred to was approved by the Court, and an Order
19 was entered on December 15, 2010. The Stipulation provided for
20 the use of 2010-1's cash collateral, modification of the loan
21 terms for both the Vista and Poway properties, and provided that
22 the terms of the Stipulation were to be incorporated into
23 debtor's Plan of Reorganization. Among those terms were debtor's
24 responsibility to cure any past due real property taxes on the

25 ///

26 ///

1 Vista property before the effective date of the plan, and also
2 provided:

3 (f) At Debtor's election, the Debtor may choose to
4 surrender the Vista property to 2010-1 at any time
5 prior to the 37th month of the loan in full satisfaction
6 of the New Vista Loan Amount. The surrender would be
7 achieved in the manner determined by 2010-1, including
8 but not limited to a Deed in Lieu of Foreclosure.

9 Debtor subsequently proposed a plan and disclosure
10 statement. Ultimately, debtor's Second Amended Plan was
11 confirmed by Order entered on November 7, 2011. Subsequently,
12 2010-1 filed its Motion to Compel Enforcement of the Plan and
13 Stipulation, contending that debtor had not complied with some of
14 her obligations under the Stipulation and confirmed Plan. More
15 specifically, 2010-1 contended debtor was obligated to pay its
16 attorneys' fees and expenses incurred in reaching the loan
17 modification, and was obligated to pay certain expenses on the
18 Vista property. Debtor had provided a deed-in-lieu to 2010-1,
19 but the latter had not executed or recorded it because of the
20 alleged breaches.

21 In June 2012, the parties reached a partial Stipulation,
22 which provided that debtor would pay 2010-1 \$15,000 in "full
23 satisfaction of Lender's claim for attorneys' fees and expenses
24 related to the loan modification." In addition, debtor would
25 transfer to 2010-1 all net rents from the Vista property by
26 cashier's check. Upon receipt of those rents, 2010-1 would
execute the deed-in-lieu. The Stipulation also provided:
"Lender's receipt of the Settlement Payment shall be without

1 prejudice to either Party's right to seek recovery of fees and
2 expenses related to the Motion or defense thereof."

3 In December, 2012, 2010-1 filed its Motion for Approval of
4 Attorneys' Fees and Expenses Related to Motion to Compel. 2010-1
5 seeks attorneys' fees of \$77,539 and expenses of \$605.97. As
6 authority for the motion, 2010-1 invoked the seemingly all-
7 purpose provisions of 11 U.S.C. § 105(a), which provides in
8 relevant part: "The court may issue any order, process, or
9 judgment that is necessary or appropriate to carry out the
10 provisions of this title." Debtor opposes 2010-1's motion.
11 Following oral argument on the motion, the Court requested
12 supplemental briefing on the applicability of the "American
13 Rule," and what authority, if any, the Court has to award
14 attorneys' fees in this matter. Both sides have filed
15 supplemental pleadings.

16 A threshold question is impliedly raised by debtor about who
17 is the prevailing party on 2010-1's Motion to Compel. Debtor
18 argues that in a practical sense she is because she has reduced
19 by her arguments and agreements the amount claimed by 2010-1 by
20 roughly 75%. To the extent that is debtor's position, it is
21 easily addressed. In Saint John's Organic Farm v. Gem County

22 ///

23 ///

24 ///

25 ///

26 ///

1 Mosquito Abatement District, 574 F. 3d 1054 (9th Cir. 2009), the
2 court explained:

3 A litigant qualifies as a prevailing party if it has
4 obtained a "court-ordered 'chang[e] [in] the legal
relationship between [the plaintiff] and the defendant.'" "

5 574 F.3d at 1058. Then the court observed:

6
7 The threshold for sufficient relief to confer
8 prevailing party status is not high. "If the plaintiff has
9 succeeded on any significant issue in litigation which
10 achieve[d] some of the benefit the parties sought in
11 bringing suit, the plaintiff has crossed the threshold to a
12 fee award of some kind." [citation omitted.] In Farrar v.
13 Hobby, 506 U.S. 103 ... (1992), the Supreme Court made clear
14 how little actual relief is necessary. Plaintiffs had
15 received only nominal damages at trial, even though in the
16 complaint they had sought substantial actual damages. The
Court nonetheless held that the plaintiffs were eligible for
attorneys' fees as prevailing parties, explaining that "a
plaintiff who wins nominal damages is a prevailing party"
because a "judgment for damages in any amount, whether
compensatory or nominal, modifies the defendant's behavior
for the plaintiff's benefit by forcing the defendant to pay
an amount of money he otherwise would not pay." ... Thus,
while the nature and quality of relief may affect the amount
of fees awarded, an extremely small amount of relief is
sufficient to confer prevailing party status.

17 574 F.3d at 1059-60.

18 In their supplemental pleadings, both sides acknowledge the
19 "American Rule", and both recognize the Supreme Court's decision
20 in Alyeska Pipeline Service Company v. The Wilderness Society,
21 421 U.S. 240 (1975) as the seminal authority on the subject. In
22 Alyeska, the Court of Appeals had awarded attorneys' fees to the
23 prevailing party "based upon the court's equitable powers and the
24 theory that respondents were entitled to fees because they were
25 performing the services of a 'private attorney general.'" 421
26 U.S. at 241. The Supreme Court explained:

1 Since there was no applicable statutory authorization for
2 such an award, the court proceeded to consider whether the
3 requested fee award fell within any of the exceptions to the
4 general 'American Rule' that the prevailing party may not
5 recover attorneys' fees as costs or otherwise.

6 421 U.S. at 245.

7 In Alyeska, the Supreme Court prefaced its review of the
8 history of fee awards with this statement:

9 In the United States, the prevailing litigant is
10 ordinarily not entitled to collect a reasonable attorneys'
11 fee from the loser. We are asked to fashion a far-reaching
12 exception to this 'American Rule'; but having considered its
13 origin and development, we are convinced that it would be
14 inappropriate for the Judiciary, without legislative
15 guidance, to reallocate the burdens of litigation in the
16 manner and to the extent urged by respondents and approved
17 by the Court of Appeals.

18 421 U.S. at 247.

19 Then, after conducting a detailed review of the history of
20 allowance of costs and disallowance of attorneys' fees in the
21 United States, the Supreme Court majority stated:

22 We need labor the matter no further. It appears to us
23 that the rule suggested here and adopted by the Court of
24 Appeals would make major inroads on a policy matter that
25 Congress has reserved for itself. Since the approach taken
26 by Congress to this issue has been to carve out specific
exceptions to a general rule that federal courts cannot
award attorney fees beyond the limits of 28 U.S.C. § 1923,
those courts are not free to fashion drastic new rules with
respect to the allowance of attorneys' fees to the
prevailing party in federal litigation or to pick and choose
among plaintiffs and the statutes under which they sue and
to award fees in some cases but not in others, depending on
the courts' assessment of the importance of the public
policies involved in particular cases.

27 ///

28 ///

29 ///

1 421 U.S. at 269. The Supreme Court concluded:

2 But the rule followed in our courts with respect to
3 attorneys' fees has survived. It is deeply rooted in our
4 history and in congressional policy; and it is not for us to
5 invade the legislature's province by redistributing
6 litigation costs in the manner suggested by respondents and
7 followed by the Court of Appeals.

6 421 U.S. at 270.

7 The constraints of Alyeska have been adhered to in this
8 Circuit, as recognized by the Bankruptcy Appellate Panel in In re
9 LCO Enterprises, Inc., 180 B.R. 567 (1995). There, the court
10 noted:

11 The currently recognized exceptions include bad faith,
12 common benefit, or the vindication of important statutory
13 rights of all citizens... "Also, a court may assess
14 attorneys' fees for the 'wilful disobedience of a court
15 order'... or when the losing party has 'acted in bad faith,
16 vexatiously, wantonly, or for oppressive reasons...'"

15 180 B.R. at 570. While this Court is not as sanguine as the BAP
16 was about including "common benefit" and "vindication of
17 important statutory rights of all citizens", neither are at issue
18 in this case.

19 2010-1 invokes as exceptions to the American Rule 1) bad
20 faith; 2) disobedience of a court order; and 3) express
21 contractual agreement between the parties. Taking the latter
22 first, the Court generally agrees that parties may agree by
23 contract to allocate liability for attorneys' fees to one side or
24 another in the event of a breach of the agreement. See, e.g., In
25 re Petrou, 2007 WL 7216521 (Bankr. S.D. CA 2007). However, this
26 Court finds and concludes that 2010-1 brought the instant

1 proceedings to enforce its asserted rights under the Stipulation
2 and the Confirmed Plan of Reorganization, neither of which
3 contain a fee-shifting provision. Instead, 2010-1 seeks to
4 invoke earlier loan documents to support their contractual claim.
5 The Court disagrees.

6 The Court also disagrees with 2010-1's assertion that
7 debtor's bad faith conduct necessitated 2010-1's Motion to
8 Compel. Apparently, in 2010-1's view, any disagreement between
9 the parties which required the court's resolution is a bad faith
10 position for the non-prevailing party. That is nonsense. To the
11 contrary, there can be, and are good faith disputes, such as the
12 date of surrender of the Vista property. In this Court's view,
13 2010-1 has failed to show that debtor's conduct with respect to
14 the issues that were the subject of the Motion to Compel was
15 undertaken in bad faith by debtor. As another example, in
16 addition to the surrender date, 2010-1 appears to argue that
17 debtor's failure to pay the full amount of fees demanded by 2010-
18 1 for its work on the loan modification, was an act of bad faith.
19 The Court disagrees.

20 The findings and conclusions stated above as to bad faith
21 also apply to 2010-1's claim that debtor violated court orders by
22 not complying with the Stipulation of the parties (approved by
23 the Court at the request of the parties), and by not "timely"
24 performing certain provisions of the Plan, such as payment of
25 2010-1's fees for its work on the loan modification. The Court
26 disagrees with 2010-1's assertions that debtor's conduct on the

1 several claims of 2010-1 rise to the level of a breach of an
2 express court order sufficient to justify fee-shifting in
3 derogation of the American Rule. Indeed, adopting 2010-1's
4 position would have the exception swallow the Rule. If that is
5 to be the result, it is for Congress to say, as the Supreme Court
6 made clear in Alyeska.

7 That leaves the issue of costs of \$605.97 which 2010-1 seeks
8 to have reimbursed. Those have not been challenged by debtor
9 and, as made clear in Alyeska, costs separate and apart from
10 attorneys' fees may be allowed. Rule 7054, Fed. R. Bankr. P.,
11 provides in relevant part: "(b) The Court may allow costs to the
12 prevailing party except when a statute of the United States or
13 these rules otherwise provides."

14 The Court has already concluded that 2010-1 is the
15 prevailing party in these proceedings, and the amount of costs
16 sought has not been challenged.

17 For all the foregoing reasons, the Court finds and concludes
18 that 2010-1's motion to approve an award of attorneys' fees shall
19 be, and hereby is denied. Further, 2010-1's request for an award
20 of costs of \$605.97 shall be granted.

21 IT IS SO ORDERED.

22 DATED: APR -2 2013

23
24 

25 PETER W. BOWIE, Judge
26 United States Bankruptcy Court