IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50061
Summary Calendar

IN THE MATTER OF: AL COPELAND ENTERPRISES, INC.,

Debtor.

AL COPELAND ENTERPRISES, INC.,

Appellant,
Cross-Appellee,

VERSUS

LOUISIANA FIRST FINANCIAL GROUP, INC.,

Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(A-93-CV-353)

(August 3, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Al Copeland Enterprises, Inc. ("ACE"), appeals the bankruptcy court's award of $2.4 million to Louisiana First Financial Group,

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Inc. ("LFFG"), for breach of contract. LFFG cross-appeals for interest outstanding on the court's award and for an additional claim of $2.5 million. Concluding that (1) the bankruptcy court erroneously applied the law on the $2.4 million claim and failed to address properly LFFG's additional claims, and (2) LFFG waived its interest claim, we vacate in part, affirm in part, and remand for rehearing on certain issues.

I.

A.

On April 7, 1988, Glenn Cortez, president of LFFG, contracted with Terry Rhoton, an officer of ACE, to provide mortgage financing for ACE. The contract provided in part that LFFG would receive a one percent commission on the total amount of financing arranged for ACE, contingent upon the monies actually being funded by the financier. In the event the monies were not funded, LFFG would receive the commitment fee only where ACE had executed a written acceptance of the financing and then later decided against consummating the deal.

Although the original agreement gave LFFG the non-exclusive right to find and place $18.2 million in mortgage financing for ACE, the contract was subsequently modified by Louis Kilbourne, ACE's chief financial officer, to increase the amount to $80 million. Sufficient consideration was given for the modification, and neither party contested that the changes were not

incorporated into the original agreement.[1] The parties subsequently modified the contract further to give LFFG the exclusive right to negotiate mortgage financing with select entities, among which was included Prudential Capital ("Pru Capital").

Throughout the course of these contractual modifications, LFFG continued to seek financing for ACE, and ACE executed, on its own, debt financing with Merrill Lynch. The involvement of Merrill Lynch led to a further modification of the agreement. Under the new arrangement, Merrill Lynch was to become involved in the mortgage financing placement, and LFFG and Merrill Lynch would split evenly a four percent commitment fee on the $120 million in mortgages expected to be placed. Subsequent to this modification, Kilbourne assured Cortez by letter that LFFG would not be cut out of the mortgage financing end of the overall portfolio restructuring; at this time, LFFG had been engaged in seeking financing suitors for ACE for more than one and one-half years.

In February 1990, when it became apparent to ACE that Merrill Lynch was unable to deliver the requisite financing, ACE began looking for alternative financing sources. LFFG wrote ACE stating that Pru Capital was interested in replacing Merrill Lynch, and ACE acted on this letter by forwarding to Pru Capital a Summary of Terms outlining the proposed financial restructuring. After reviewing the Summary of Terms, Pru Capital ultimately referred ACE

[1] We note at the outset that none of the numerous modifications, all of which are outlined in this discussion, have been objected to by the parties on the ground of legal sufficiency. We thus assume that the modifications are incorporated fully into the agreement in question.

to Prudential Bache Securities ("Pru Bache"), a separate arm of the Prudential Companies more appropriate to the type of financing ACE sought.

Following an initial meeting between ACE, LFFG, and Pru Bache, Cortez made arrangements for Al Copeland, ACE's founder and president, to meet with the Pru Bache financial officers. However, Peter Butler, ACE's outside corporate counsel, attended the meeting in Copeland's place. It is the events of the breakfast meeting between Cortez, Butler, and Kilbourne, which occurred on August 16, 1990, the day of the scheduled Pru Bache meeting, from which this lawsuit arises.

According to Cortez, Butler became upset about the amount of the commitment fee to be paid to LFFG and wanted to cancel the Pru Bache meeting altogether. Kilbourne refused to do so, and the meeting went off as planned. Butler reportedly was pleased with the outcome of the meeting, so much so that he canceled the remaining meetings with the other contenders for ACE's financing arrangements. Shortly after the August 16 meeting, an internal Pru Bache committee approved a plan to assist ACE in restructuring its liabilities.

One week after the meeting, Kilbourne contacted Cortez by phone to inform him that Butler was still concerned about LFFG's commitment fee arrangement and that Butler did not want to continue the negotiations with Pru Bache as long as LFFG stood to take a commission. Kilbourne also informed Cortez that he (Kilbourne) had been removed by Butler from the negotiations. Cortez apparently

entered into negotiations with Pru Bache regarding an alternate method of receiving the commission, but an agreement never materialized.

The negotiations between Pru Bache and ACE continued at an August 1990 meeting, from which Cortez was absent, although no financing deal was ever struck. By letter of August 29, Kilbourne terminated ACE's relationship with Cortez and LFFG and stated that ACE had no intention at that time to effect a financing arrangement with Pru Bache. ACE eventually selected First Boston to reorganize its finances and to begin negotiations with lenders. First Boston's efforts were unsuccessful; ACE filed for bankruptcy in April 1991.

B.

LFFG filed suit against ACE in state court, alleging that LFFG was the procuring cause of certain loans made to ACE and was therefore entitled to the commitment fee provided for in the contract.[2] The original petition was amended to assert additional claims for bad faith breach of contract. Following ACE's chapter 11 bankruptcy filing, LFFG filed its proof of claim in the bankruptcy court, and the case was tried as a core proceeding in February 1993. According to the bankruptcy court, the crucial

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[2] LFFG sought a total of $4.9 million from ACE: $2.4 million from the 2% commission on the $120 million mortgages and 1% of the restructured debt over the $120 million mortgaged debt (LFFG reports that ACE's total debt to be refinanced was approximately $398 million.). Interestingly, the additional 1% fee never appears in the bankruptcy court's recitation of the facts of the case. We address this point in a subsequent section dealing with LFFG's cross-claim.

issue was whether ACE's decision not to pursue mortgage financing discussions with Pru Bache was motivated by ACE's desire not to pay LFFG's commitment fee and not by any business analysis of Pru Bache's ability to secure financing.

The bankruptcy court found that ACE's decision to abandon Pru Bache was made in order to avoid paying LFFG's fee, which action constituted a breach of contract that prevented the fulfillment of LFFG's suspensive conditions to the contract. Under LA. CIV. CODE art. 1772, the bankruptcy court held that the suspensive conditions of the contract (the mortgage financing) were thus fulfilled and awarded LFFG $2.4 million (2% on the $120 million mortgage financing). All other relief was denied.

ACE appealed the decision to the district court, and LFFG entered a cross-appeal for the additional $2.5 million in fees that the bankruptcy court had denied. The district court affirmed in whole the bankruptcy court's decision, sustaining the $2.4 million judgment in favor of LFFG and denying its petition for supplemental damages. This appeal follows.

II.

We review independently of the district court's affirmance of the bankruptcy court's findings. Killebrew v. Brewer (In re Killebrew), 888 F.2d 1516, 1519 (5th Cir. 1989). Factual errors are reviewed under the clearly erroneous standard, and issues of law are reviewed de novo. Id.

A.

ACE first contends that the bankruptcy court erred in shifting the burden of proof to ACE to demonstrate that its decision not to proceed with the financing arrangement with Pru Bache was motivated by other business criteria, rather than by its desire not to pay LFFG's commitment fee. We find that the bankruptcy court committed no legal error in its disposition of this portion of the case.

ACE does not dispute that the bankruptcy proceeding arose out of claims pursuant to 11 U.S.C. § 502(b)(1). Objections to claims are treated under a different standard than are other proceedings. The initial burden lies with the claimant, who must allege facts in the proof of claim that are sufficient to support the claim. If facts sufficient to establish liability are alleged, the proof of claim is prima facie; claimant has met the initial burden of production sufficient to go forward. Robinson v. Hinkley (In re Hinkley), 58 B.R. 339, 348 (Bankr. S.D. Tex. 1986), aff'd, 875 F.2d 859 (5th Cir. 1989).

The debtor must then present evidence of a probative force at least equal to that submitted by the claimant that could refute at least one of the elements of the prima facie claim. If the debtor meets this burden, the burden of proof then shifts back to the claimant to establish the claim's validity. Id. "The validity of claims and defenses are [sic] to be determined under state law." Id. (citation omitted).

The bankruptcy court correctly recognized that this case was a Hinkley proceeding and properly applied the standard. Although

the court's decision did not speak directly to it, LFFG had alleged sufficient facts at the outset to create a prima facie case of bad faith breach. Evidence of this assumption is gleaned from the judge's exchange with ACE's counsel at the beginning of the trial. At that time, the judge instructed that ACE would be required to produce evidence sufficient to rebut the prima facie case established by LFFG. Prior to this exchange, ACE's counsel had anticipated that LFFG would have to present its case first. In fact, ACE had not scheduled its primary witness (Kilbourne) to arrive in Austin until the following morning.

ACE then presented the rest of its case in a short period of time, after which the bankruptcy judge, instead of adjourning for the day in order to wait for Kilbourne's testimony, asked LFFG to begin putting on its evidence. The record was held open to allow ACE to present Kilbourne's testimony in order to satisfy its Hinkley burden, subject to LFFG's exception that it was not waiving its right to require ACE to satisfy the burden.[3] LFFG completed its presentation on this first day of trial, leaving only Kilbourne's testimony for the second day.

In light of this chronology and the bankruptcy court's findings of fact, we find no legal error. According to the court, "although ACE disputed LFFG's allegation that ACE chose First

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[3] ACE's suggestion that LFFG waived its right to require ACE to meet its Hinkley burden by beginning its presentation before Kilbourne had testified is without merit. ACE admits in its reply brief that LFFG's counsel stated, "[W]e don't have any objection to waiting for Mr. Kilbourne to testify tomorrow, but we don't want to waive any of our rights in connection therewith by going forward with our case." This statement is not, as ACE suggests, an "elliptical[]" reference to Hinkley, but rather a plain recognition of LFFG's desire to accommodate the court's schedule without compromising its case.

Boston instead of Pru Bache solely because with Pru Bache [they] would have to pay LFFG a two percent (2%) fee, ACE put virtually no evidence into the record to support this position." This finding alone was sufficient to fail ACE's burden of proof under Hinkley, at which time the court was entitled to conclude that the commitment fee was the motivating factor behind ACE's decision to reject Pru Bache. Given ACE's failure to carry its Hinkley burden, no recourse to state law was required, as the burden had not yet shifted back to LFFG.

The bankruptcy court did not, however, complete its analysis at that point. Rather, it discussed what it found to be the abundance of evidence submitted by LFFG in support of its contention))testimony from Pru Bache representatives and from Kilbourne, all of whom proffered evidence of LFFG's commitment fee as a significant sticking point. The court also noted that no one testified on behalf of ACE as to why Pru Bache was not selected; Kilbourne stated only that Copeland had made the final decision for reasons to which he was not privy. Copeland was never called to testify, nor did he submit affidavits or deposition testimony. Thus, as the bankruptcy court stated,

> [f]rom ACE's presentation, we are left simply to speculate. From LFFG's presentation it is clear. There is ample evidence, other than Cortez'[s] testimony, that lead this Court to find that from a preponderance of the total evidence in the record, including the lack of any probable evidence on the subject being introduced by ACE to the contrary, that the reason ACE did not choose Pru Bache was because it would have had to pay LFFG a two percent (2%) fee if Pru Bache had been successful.

We may thus affirm on two separate grounds. First, the court

was entitled to find that the commitment fee motivated the ACE's Pru Bache decision at the second stage of the Hinkley analysis; that is, ACE failed to rebut LFFG's prima facie case. We find no legal error in the court's application of the relative burdens of proof under Hinkley. In the alternative, the court was entitled, assuming that ACE had satisfied its burden, to reach its decision on the basis of LFFG's presentation of evidence in support of its claim; the court properly weighed the evidence and found that LFFG had proved its claim by a preponderance. Under this line of reasoning, we also find no legal error and no clearly erroneous factual findings.

ACE's reliance upon Stevens v. Tynes, 357 So. 2d 7 (La. App. 3d Cir.), cert. denied, 357 So. 2d 1152 (La. 1978), is inapposite.[4] First, Stevens is not a bankruptcy case, but rather a dispute over real estate brokerage fees. As such, the Hinkley burden does not attach, and, if the court found that ACE did not produce enough evidence to rebut LFFG's prima facie case, the state law upon which Stevens is predicated is inapplicable. Second, even if the court found that ACE had produced sufficient evidence and thus the burden shifted back to LFFG, Stevens does not contradict the court's findings on the issue of the motivation behind ACE's Pru Bache decision. The Stevens court never addressed whether the defendant

[4] ACE also takes issue with the court's citation of Associated Exec. Control, Inc. v. Bankers Union Life Ins. Co., 367 So. 2d 811 (La. 1979), and United Gas Pub. Serv. Co. v. Christian, 173 So. 174 (La. 1937). Although we agree with ACE that these cases are not applicable to the commitment fee issue, we do not believe they compel any different result from that reached by the court.

had removed her property from the market in order to defeat the broker's commission. Here, the bankruptcy court did reach that issue and found that a preponderance of the evidence favored LFFG's claim.

B.

ACE next contends that, even if its decision to terminate negotiations with Pru Bache was motivated by its desire not to pay LFFG's commitment fee, the bankruptcy court erred in finding this to be a breach of contract under Louisiana law. According to ACE, the court wrongly placed the burden of proof on ACE to show that the suspensive condition))the financing by Pru Bache))would not have been satisfied. Instead, ACE suggests that Louisiana law requires that LFFG shoulder this burden))that but for ACE's alleged bad faith breach, LFFG would have effected an adequate financing arrangement with Pru Bache.

"A condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment." LA. CIV. CODE art. 1772. Article 1772 replaced article 2040, but only the scope of the article has been broadened to encompass the fault of either party, id. at comment (a); its effect remains the same. Both parties agree that article 2040 had been interpreted to require a showing on LFFG's part that the contract would have been fulfilled but for ACE's breach, see Stevens, 357 So. 2d at 10, and article 1772 directs us that the application of 1772 is the same as that of 2040, yet with broader

scope. See also Schollian v. Ullo, 558 So. 2d 776, 780 (La. App. 5th Cir.), cert. denied, 564 So. 2d 324 (La. 1990). As such, article 1772 encompasses the article 2040 requirement that LFFG evince proof that Pru Bache would have offered financing but for ACE's breach of the suspensive condition.

After reviewing the bankruptcy court's disposition of this issue, we are not convinced that the court applied the proper legal standard to this issue: "ACE presented no evidence at trial that the financing arrangement with Pru Bache would not have gone through. But for ACE's breach, the financing arrangement may well have been consummated with Pru Bache. However, the point is that we'll never know because of ACE's breach of the contract." This finding by the court is sufficiently ambiguous as to require a remand; we are left to speculate whether the court properly construed the legal burden to fall on LFFG to prove the procurement of financing with Pru Bache.

We agree with ACE that Associated and United Gas say nothing to the contrary. Associated is inapposite on procedural grounds))the case dealt with whether a cause of action had been pled, so the court accepted all of the plaintiff's allegations, including that the stock sale would have been consummated absent defendant's breach, as true. Id. at 813-14. United Gas is similarly infirm. Indeed, the legal precedent from which the United Gas court derived its opinion had recognized that showing that the endeavor would not have succeeded even in the absence of a breach would likely be a valid defense to defeat obligations

under a suspensive condition. This defense was not raised by the defendant in United Gas. Id. at 176.

Despite LFFG's assertion that the record unequivocally demonstrates that Pru Bache would have been successful in restructuring ACE's financial obligations, we refuse to engage in a wholesale inquiry of the trial facts. The bankruptcy court is better equipped to weigh the evidence and determine whether the same result attaches under the appropriate legal standard. Furthermore, our ability to resolve the factual dispute is compromised by the ambiguities with which the Hinkley factors are addressed in the bankruptcy court's disposition. Apart from the verbal interaction at the beginning of the trial between the court and ACE's counsel regarding the Hinkley burden, the court does not discuss the standard in its opinion. As such, we are left to speculate whether ACE satisfied its Hinkley burden))and thus the burden under state law shifted back to LFFG))or whether, instead, the court found for LFFG as a result of ACE's failure to overcome LFFG's prima facie case. The fact that the briefs of both parties acknowledge that the burden to demonstrate that Pru Bache would have secured financing falls properly on LFFG supports our presumption that ACE had satisfied its initial Hinkley burden. We refuse, however, to proffer a guess where the bankruptcy court on remand is better able to dispose of the case.

We therefore reverse the $2.4 million judgment and remand to the district court (for further remand to the bankruptcy court) in order that the bankruptcy court may clarify its decision and

application of the laws. If it decides that ACE has met its Hinkley burden, it should then require that LFFG prove that the deal with Pru Bache would have been consummated but for ACE's breach.

C.

Because we have remanded on the issue of the burden of proof on the consummation of the deal with Pru Bache, we need not address ACE's other points of error. We note, however, that we find no factual errors that rise to the level of clearly erroneous in the bankruptcy court's resolution of the matter. With the exception of the potential legal error to which we have alluded, we find that the factual findings of the court are sufficient to support the judgment. The court's application of the proper legal standards to these facts should cure any deficiencies in the decision.

III.

A.

On its cross-appeal, LFFG first asks this court to award an additional $2.5 million in commitment fees that the bankruptcy court denied. We refuse to do so, but remand this issue for further consideration. We find inadequate the bankruptcy court's summary disposition of the additional $2.5 million in claims; with the exception of a single sentence in the Conclusion section of the memorandum ("All other relief is denied."), the court did not properly address its reasons for denying such relief. We decline

LFFG's invitation to engage in factfinding on this issue and defer instead to the expertise of the bankruptcy court. Our decision to remand should in no way be construed as an endorsement of LFFG's $2.5 million claim, but only as the recognition of the need for an explanation.

B.

LFFG's request for interest raises an interesting issue with respect to the application of state laws in the bankruptcy court. It is undisputed that LFFG did not move the bankruptcy court to award interest on its judgment, did not cross-appeal from the court's failure to award interest, and did not identify interest in its BANKR. R. 8006 filing in the district court. As such, ACE contends that LFFG waived its objections to the failure to award interest. Yet, LFFG insists that Louisiana law provides that a plaintiff does not waive his claims for interest even if the interest is never prayed for in the original petition. See Mini Togs Prods. v. Wallace, 513 So. 2d 867, 872 (La. App. 2d Cir.), cert. denied, 515 So. 2d 451 (La. 1987).

We begin our discussion by resolving the undisputed legal issues. First, we agree with ACE that, even if we were to allow LFFG to claim interest on its judgment, LFFG would be entitled only to interest that had accrued prior to ACE's April 1991 filing with the bankruptcy court. Interest on debt stops at the filing of the bankruptcy petition, and any unmatured interest does not become part of the claim. See 11 U.S.C. § 502(b)(2). Second, we agree

with LFFG that Louisiana law, in the non-bankruptcy context, allows recovery for interest on debts arising ex contractu from the time they become due. Rivnor Prop. v. Herbert O'Donnell, Inc., 633 So. 2d 735, 749 (La. App. 5th Cir. 1994). Under Louisiana law, LFFG's failure to pray for interest would not defeat its petition to recover interest now. See LA. CIV. CODE art. 1921.

Assuming the validity of these legal propositions, we now address whether state law or the Bankruptcy Code provision prevails. In general, the Code tries to preserve the substantive rights of the parties available to them under the relevant state law. Todd J. Zywicki, Cramdown and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code, 19 T. MARSHALL L. REV. 241, 251 (1994). However, rule 8006 provides an unequivocal mandate that the appellant has the duty to designate all proper matters on which he desires the appellate court's review. See GHR Corp. v. Crispin Co., Ltd. (In re GHR Corp.), 791 F.2d 1200, 1201 (5th Cir. 1986). LFFG's failure to include interest among the issues to be raised on cross appeal and its failure to amend the filing pursuant to rule 10(e) constitute waiver of this issue on appeal. See Woods v. Pine Mtn., Ltd. (In re Pine Mtn., Ltd.), 80 B.R. 171, 173 (Bankr. 9th Cir. 1987).

We are aware that the court in Harrison v. Brent Towing Co. (In re H&S Transp. Co.), 110 B.R. 827 (M.D. Tenn. 1990), aff'd, 939 F.2d 355 (6th Cir. 1991), reached a different result. In re H&S Transp. Co. is distinguishable, however, in that the appellant had raised the "new value" defense in the bankruptcy court but had

failed to do so in its 8006 filing. Hence, appellee was on notice of this defense. In contrast, LFFG failed to raise the interest question at any point prior to entering its cross-appeal in this court. As such, ACE had no prior notice of the issue, and we hold that it would be inequitable to review the issue in light of LFFG's failure to adhere to the express requirements of rule 8006. Additionally, in light of the fact that the § 502(b)(2) provision excluding post-petition interest is based largely upon equitable considerations, see Hanna v. United States (In re Hanna), 872 F.2d 829, 830 (8th Cir. 1989), we look to the equities and find that they favor ACE in this case.

Finally, we hold that LFFG is not entitled to raise the interest issue even under an equitable exception to the rule 8006 filing requirement. "An issue that is not listed pursuant to this rule and is not inferable from the issues that are listed is deemed waived and will not be considered on appeal." Snap-on Tools, Inc. v. Freeman (In re Freeman), 956 F.2d 252, 255 (11th Cir. 1992). We do not believe that the accrual of interest is inferable from any of the claims raised by LFFG and, as such, refuse to review the issue on appeal.

C.

We need not address LFFG's other quasi-contractual remedies, which the bankruptcy court found unnecessary to reach owing to its finding for LFFG on the contractual breach. We merely note that the bankruptcy court may consider, on remand, these claims if the

court reverses the contractual breach claim it previously decided in favor of LFFG.

IV.

We VACATE the $2.4 million judgment and REMAND to the district court, for remand to bankruptcy court, to resolve the question of whether the court properly placed the burden of proof as to whether Pru Bache would have effected financing but for ACE's breach. We AFFIRM all of the court's factual findings on this issue.

On cross-appeal, we VACATE and REMAND to the district court, for remand to the bankruptcy court for further consideration of LFFG's additional $2.5 million claim. We reject LFFG's request for interest on the $2.4 million judgment and do not reach at this time LFFG's other quasi-contractual claims. The bankruptcy court is, however, free to consider these claims if on review it reverses the $2.4 million judgment for LFFG.