



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 24, 2015

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 12-12349-MKN
	)	Chapter 11
AMERICAN WEST DEVELOPMENT, INC.,	)	
	)	
Debtor.	)	Date: July 22, 2015
	)	Time: 9:30 a.m.

**ORDER ON MOTION OF ZURICH AMERICAN INSURANCE COMPANY AND ITS AFFILIATE INSURERS TO DETERMINE AND DECLARE THAT THE DEBTOR’S DISCHARGE DOES NOT EXTEND TO CERTAIN IDENTIFIED NON-DEBTORS, OR, IN THE ALTERNATIVE, TO MODIFY DISCHARGE INJUNCTION<sup>1</sup>**

On July 22, 2015, the court heard the Motion of Zurich American Insurance Company and Its Affiliate Insurers to Determine and Declare that the Debtor’s Discharge Does Not Extend to Certain Identified Non-Debtors, or, in the Alternative, to Modify Discharge Injunction (“Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On March 1, 2012, American West Development, Inc. (“Debtor”) filed a voluntary Chapter 11 petition. (ECF No. 1). On October 26, 2012, Debtor filed its first amended Chapter 11 plan of reorganization (“Plan”). (ECF No. 714).

On February 14, 2013, an order was entered confirming the Debtor’s first amended

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRCP” are to the Federal Rules of Civil Procedure.

1 Chapter 11 plan of reorganization (“Confirmation Order”). (ECF No. 853).

2 On September 5, 2013, a final decree was entered closing the case. (ECF No. 1039).

3 On June 1, 2015, the instant Motion was filed by Zurich American Insurance Company  
4 (“Zurich”). (ECF No. 1056). The Motion was noticed to be heard on July 8, 2015. (ECF No.  
5 1057). Zurich filed a Certificate of Service indicating the parties that were given notice of the  
6 Motion. (ECF No. 1059).

7 On June 24, 2015, Debtor filed opposition to the Motion (“Opposition”) (ECF No. 1062),  
8 accompanied by the Declaration of Edward Lubbers (ECF No. 1063).

9 On June 30, 2015, an order was entered approving a stipulation to continue the hearing to  
10 July 22, 2015. (ECF No. 1066).

11 On July 15, 2015, Zurich filed its reply to the Debtor’s opposition (“Reply”). (ECF No.  
12 1069).

### 13 **DISCUSSION**

14 By its Motion, Zurich seeks a determination that confirmation of the Debtor’s Plan did  
15 not discharge the obligations of twenty-five non-Debtor parties regarding certain self-insured  
16 retentions. Those 25 parties include individuals, corporations, limited liability companies, trusts,  
17 and unspecified forms. They are identified in the Motion as:

- 18 1. American West Homes, Inc.
- 19 2. Whitney Ranch, Inc.
- 20 3. Gowan Properties, Inc.
- 21 4. El Capitan, Inc.
- 22 5. Federal Land Management, LLC
- 23 6. Cactus Sand & Gravel, Inc.
- 24 7. Pinnacle Peaks, LLC
- 25 8. West Mesa, LLC
- 26 9. Coronado Hills, LLC
- 27 10. Adaven Management, Inc.
- 28 11. Section 31, LL
12. The Canarelli Family Trust Dated September 14, 1990
13. The Lawrence and Heidi Canarelli 1993 Irrevocable Trust
14. The Stacia Leigh Lemke Irrevocable Trust
15. The Scott Lyle Graves Canarelli Irrevocable Trust
16. The Jeffrey Lawrence Graves Canarelli Irrevocable Trust
17. The Allysa Lauren Graves Canarelli Irrevocable Trust
18. Lawrence D. Canarelli
19. Heidi Canarelli
20. The SLG Canarelli 1993 Retained Annuity Trust
21. The ALG Canarelli 1993 Retained Annuity Trust

22. The SL Canarelli 1993 Retained Annuity Trust
23. The JLG Canarelli 1993 Retained Annuity Trust
24. Silverado Crossing
25. Silverado Canyone

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3 See Motion at 10:18 to 11:3. Zurich alleges that it made demand for reimbursement on some or  
4 all of the identified non-Debtor parties, but that the Debtor asserted that confirmation of its Plan  
5 bars Zurich's claims for reimbursement. Id. at 5:5 to 9:8.<sup>2</sup> Zurich argues that the Debtor's  
6 discharge does not extend to the non-Debtor entities and seeks an order from the court either  
7 declaring that the discharge does not bar its claims against the specified non-Debtor parties, or  
8 modifying the discharge injunction to permit Zurich to pursue its claims.

9  
10 Debtor objects to the relief on numerous grounds. First, it maintains that Zurich is time-  
11 barred from seeking revocation or modification of the Plan Confirmation Order. See Opposition  
12 at 6:5 to 8:4. Second, Debtor argues that reimbursement from the non-Debtor parties of any  
13 professional fees incurred in the bankruptcy proceeding are barred by the June 15, 2013 deadline  
14 for professional fee requests in the Chapter 11 proceeding. Id. at 8:5-10. Third, it argues that  
15 Zurich is precluded from any equitable relief under the doctrine of laches. See Opposition at  
16 8:11-18. Fourth, it argues that the Motion is improper because the Chapter 11 case was closed  
17 by the final decree on September 5, 2013, and Zurich never brought a motion to reopen the case  
18 prior to filing the instant Motion. Id. at 8:19 to 9:16. Fifth, Debtor argues that the court lacks  
19 authority under Section 105(a) to extend any applicable deadlines that already have expired. Id.  
20 at 9:19 to 10:15. Sixth, it maintains that the relief requested must be sought through an  
21 adversary proceeding. Id. at 10:18 to 11:14. Seventh, Debtor argues that any joint and several  
22 liability of named insureds under the subject policies would include the Debtor and the Debtor's  
23 discharge, therefore, prevents Zurich from pursuing the non-Debtor parties. Id. at 11:16 to  
24 12:20. Finally, Debtor maintains that the court lacks jurisdiction to grant the relief requested by  
25 Zurich. Id. at 13:4 to 15:19.

26 Zurich's response generally repeats that it is simply seeking a declaration regarding the

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27 <sup>2</sup> Attached to the Motion is the Declaration of Nancy Dow ("Dow Declaration") to  
28 authenticate copies of certain exhibits, but which does not attest to any demands being made on  
non-Debtor entities, nor to the Debtor's response on behalf of the non-Debtor entities.

1 scope of the Confirmation Order, rather than to extend any deadlines to obtain relief from the  
2 order. See Reply at 1:24 to 3:20. It essentially asserts that an adversary proceeding is not  
3 required to obtain a clarification of the Confirmation Order, see id. at 3:22-28, but does not  
4 address the specific arguments raised by the Debtor..

5 The court having considered the written and oral arguments of counsel, together with the  
6 record, concludes that the Motion must be denied for a variety of reasons.

7 First, Zurich has failed to provide competent evidence that the Debtor is even asserting  
8 the Confirmation Order on behalf of the non-Debtor parties. The Dow Declaration makes no  
9 reference to a demand being made on the non-Debtor entities nor of any response made by the  
10 Debtor. It appears that the declarant has no personal knowledge whatsoever of such events.  
11 Thus, the Motion fails for lack of evidence.

12 Second, Zurich has failed to demonstrate a case in controversy. No evidence has been  
13 offered that a non-Debtor entity has asserted the Confirmation Order as a defense to a demand  
14 for reimbursement. Even if Zurich commenced litigation against a non-Debtor party, however, a  
15 bankruptcy discharge arguably is an affirmative defense that must be raised in an answer or it is  
16 waived. For example, Rule 8(c) of the Nevada Rules of Civil Procedure (“NRCPC”) lists the  
17 affirmative defenses that must be asserted by a defendant in answering a civil complaint.  
18 “Discharge in bankruptcy” is one of the defenses that NRCPC 8(c) requires to be pled  
19 affirmatively.<sup>3</sup> Under Nevada law, the failure to plead an affirmative defense may result in its  
20 waiver, see Webb v. Clark Cnty. School Dist., 125 Nev. 611, 619-20, 218 P.3d 1239, 1245 (Nev.  
21 2009), although the trial court may allow an amendment. See Whealon v. Sterling, 121 Nev.  
22 662, 665-66, 119 P.3d 1241, 1244 (Nev. 2005).<sup>4</sup> Thus, to the extent that Zurich fears a non-

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24 <sup>3</sup> To the extent a non-Debtor party does not assert a bankruptcy discharge as a defense,  
25 but instead asserts estoppel, res judicata, waiver or some other basis for avoidance of liability,  
those concepts also must be asserted as affirmative defenses under NRCPC 8(c).

26 <sup>4</sup> In contrast, the requirement of asserting a bankruptcy discharge as an affirmative  
27 defense in a federal civil action was eliminated from FRCP 8(c)(1) effective December 1, 2010,  
28 because Section 524(a)(1) and Section 524(a)(2) voids any judgment determining the personal  
liability of a debtor with respect to a discharged debt. See FED. R. CIV. P. 8 advisory  
committee’s note (2010 Amendments). Even prior to the 2010 amendment, the Bankruptcy

1 Debtor entity asserting the Debtor's discharge as a defense there is no evidence that any such  
2 defense would be raised by a party with standing to do so.

3 Third, Zurich's concern regarding a possible violation of the discharge injunction against  
4 an act to pursue a debt as "a personal liability of the debtor" under Section 524(a)(2) ignores the  
5 nature of its purported claims against the non-Debtor entities. Section 524(e) makes clear that a  
6 debtor's discharge does not affect the liability of any other entity for the same debt. As such  
7 non-debtor entities do not receive a discharge, the discharge injunction simply does not apply.  
8 Whether a bankruptcy court order provides some other basis for relief to a non-debtor is  
9 unrelated to the protection of the discharge.<sup>5</sup>

10 Finally, Zurich has failed to provide sufficient notice of the relief it seeks to the non-  
11 Debtor entities. If in fact the non-Debtor entities are protected in some fashion by the  
12 Confirmation Order or terms of the confirmed Plan, then clearly the relief sought by Zurich  
13 directly affects their interests. Unfortunately, the Certificate of Service accompanying the  
14 Motion does not identify which of the 25 non-Debtor entities, if any, were served.

15 For these reasons, Zurich has failed to demonstrate that the relief requested by its Motion  
16 is warranted.

17 **IT IS THEREFORE ORDERED** that the Motion of Zurich American Insurance  
18 Company and Its Affiliate Insurers to Determine and Declare that the Debtor's Discharge Does  
19 Not Extend to Certain Identified Non-Debtors, or, in the Alternative, to Modify Discharge  
20 Injunction, Docket No. 1056, be, and the same hereby is, **DENIED**.

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22  
23 Appellate Panels for this circuit concluded that the bankruptcy discharge is an absolute,  
24 nonwaivable defense to postdischarge collection activity. See Lone Star Sec. & Video, Inc. v.  
25 Gurrola (In re Gurrola), 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005). States such as Arizona have  
26 taken steps to eliminate the bankruptcy discharge as an affirmative defense in light of  
27 amendments to FRCP 8(c), see, e.g., 16 A.R.S. Rules of Civil Procedure, Rule 8(c) (effective  
28 January 1, 2013), but Nevada has not.

<sup>5</sup> At the hearing on the Motion, counsel for the Debtor correctly acknowledged that the  
non-Debtor parties did not obtain a bankruptcy discharge of the claims asserted by Zurich. Thus,  
there would be no violation of a discharge injunction.

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