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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JACK D. PICKEL, formerly doing business as Officer of Alameda Land Investment Corporation, doing business as Sole Member Alameda Virgin Islands Company, LLC, formerly doing business as Manager/Member of P.O.S.T. Land Ltd. Company, doing business as Officer of Club Comanche, Inc., doing business as J. Pickel & Company, Inc., Debtor.	BAP No. NM-13-046
MARY BOEHM, Plaintiff – Counter-Defendant – Appellant, v. JACK D. PICKEL and ALAMEDA VIRGIN ISLANDS COMPANY, LLC, Defendants – Counter-Claimants – Appellees.	Bankr. No. 12-13262 Adv. No. 12-01319 Chapter 11 OPINION[*]

Appeal from the United States Bankruptcy Court for the District of New Mexico

Before KARLIN, ROMERO, and HALL[1], Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

[*] This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Honorable Sarah A. Hall, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

Mary Boehm agreed to sell to Alameda Virgin Islands Company, LLC (AVIC) her large share of Club Comanche (Comanche), a corporation that owned a hotel and restaurant (Hotel) located on premium real estate on St. Croix, Virgin Islands. After AVIC made payments totaling $550,000 of the $800,000 required, and added $1.9 million in improvements, Boehm seems to have had a change of heart. She decided it might be a good idea to hold on to this property after all, as it had more than doubled in value since she sold it.

The bankruptcy court found her efforts to regain the Hotel constituted an anticipatory repudiation of the contract. As a result, it granted AVIC's request for specific performance and awarded a portion of the damages it sought. Boehm asks this court to reverse those decisions.

Because our review of the record and applicable law confirm that Boehm repudiated the contract and caused AVIC the damages the bankruptcy court awarded, we instead affirm.

I. BACKGROUND[1]

In 2007, a Virgin Islands superior court granted a money judgment against Comanche and directed it to issue 156 shares of its stock to a third party. Until then, Boehm[2] and her late husband owned all of the Comanche stock. As a result of the judgment, Boehm decided to sell her remaining shares of stock to AVIC, also a Virgin Islands entity, which was wholly owned and managed by Jack Pickel (Pickel), the debtor.

The 2007 sale contract (Agreement) conveyed to AVIC the right to vote 447.5 shares of Comanche and to receive any and all dividends or distributions

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[1] Unless indicated otherwise, the basic facts not in dispute have been taken from the bankruptcy court's published opinion, *Boehm v. Pickel (In re Pickel)*, 493 B.R. 258 (Bankr. D.N.M. 2013) (hereafter "*Memorandum Opinion*").

[2] Boehm's son was also a party to the Agreement, but because he only owned one share of Comanche stock and is not a party to this appeal, we refer solely to Mary Boehm.

with respect to those shares. In exchange, AVIC was required to pay $800,000 in four installments; the fourth and final payment was to be $250,000 and was due November 1, 2009.[3] Pickel also executed a non-negotiable promissory note ("Note") in favor of Boehm on behalf of AVIC,[4] which required payments be made to Boehm at the Hotel, since the Agreement contemplated she would continue to live there for a few months. The Note required her to "designate in writing" if payments should be sent to a different address. No evidence received at trial demonstrated she ever so designated.

AVIC made the first three payments totaling $550,000, but did not pay the final $250,000 installment on its due date. It is AVIC's failure to timely make this final payment that precipitated the events that are at the crux of this appeal. The Agreement provided that AVIC "shall be deemed in default, if after ten (10) business days after receipt of written notice of default, [AVIC] fails to cure."[5] Accordingly, one day after the final payment was due, Boehm and her daughter drafted the contemplated written notice (Notice of Default) and delivered it to AVIC's counsel.

The Notice of Default erroneously stated that the last day to cure the default was November 13, 2009, notwithstanding that the Agreement, itself, provided a cure period of ten ***business*** days—or until November 17, 2009.[6] As a

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[3] *Agreement* at 1, ¶ 1, *in* Appellant's App. at 312. The payment schedule was as follows: $275,000 upon execution of Agreement, $25,000 on November 30, 2007, $250,000 on November 1, 2008, and $250,000 on November 1, 2009.

[4] *Id.* at 2-3, ¶¶ 4, 6 *in* Appellant's App. at 313, 314. The Agreement expressly states that it is not a sale of the stock itself, but undoubtedly contemplates a future sale of the stock to AVIC (for one dollar) provided it does not default. The language suggests that when the Agreement was executed, an outright sale of the stock could not take place for legal reasons. *Id.*

[5] *Id.* at 6, ¶ 15, *in* Appellant's App. at 317.

[6] Although the Notice of Default actually (and accurately) stated "Alameda has ***(10) business days*** to cure this default in accordance with paragraph 15 of the

(continued...)

result, because AVIC received the Notice of Default on November 2, the contractual deadline for it to cure nonpayment was actually November 17.[7] The Notice, which is not on letterhead of any sort, provided no address where the cure payment should be made.

Notwithstanding that AVIC had an additional four days to cure, Boehm's counsel delivered a letter to Pickel on November 13 purporting to terminate the Agreement and declare it null and void (Termination Letter). The Termination Letter demanded immediate possession of the Hotel, including turnover of the keys to all rooms, terminated Pickel's employment by Comanche, ordered all employees to vacate the Hotel the same date the Termination Letter was delivered, and terminated all corporate directors.[8] The letter further claimed that AVIC had "no further rights."

Pickel claims that AVIC attempted to cure the default by tendering a check in the full amount due on November 16, but that Boehm's counsel refused to accept the check. He also claims he left a voice mail message for her on November 17 and told her she could pick up the check from the Hotel that same day.[9] Nine days later, Boehm filed an action in the Virgin Islands

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[6] (...continued)
Agreement," it then erroneously required AVIC to pay the balance "by ***November 13, 2009***[.]" *See* Notice of Default, *in* Appellant's App. at 353 (emphasis added).

[7] No one disputes November 11th was properly omitted as a business day because it was a federal holiday (Veterans Day).

[8] The Agreement provided that Boehm and her son would resign from their positions as officers and directors of Comanche upon execution to allow "orderly appointment of new officers and directors and a smooth transition to new corporate management and governance." *Agreement* at 4, ¶ 8, *in* Appellant's App. at 315.

[9] Boehm makes much of the fact that Pickel delivered the check to the Hotel address when he knew she did not live there, claiming his tender was thus insufficient, but the Agreement clearly provided the Hotel as the correct location for all notices to her. She failed to change the location for notices, as the Agreement clearly allowed. In addition, there is abundant evidence in the record
(continued...)

superior court seeking: 1) a declaratory judgment that she validly terminated the Agreement and, therefore, it was null and void; and 2) injunctive relief preventing Pickel from occupying the Hotel or operating a business on the premises (Local Action). She obtained an ex parte temporary restraining order (TRO) dispossessing Pickel of the Hotel for four days. Boehm also filed a lis pendens against the Hotel. Although the Local Action had been on file for several years, it remained pending when Pickel filed for bankruptcy protection in New Mexico in 2012.[10]

II. BANKRUPTCY COURT PROCEEDINGS

Several months after Pickel filed his Chapter 11 petition, Boehm filed this adversary proceeding seeking a declaratory judgment that the Agreement was null and void. Pickel counterclaimed for breach of contract and slander of title; he sought specific performance as well as damages for lost revenue and the attorney's fees he incurred when forced to quickly litigate the dissolution of the TRO in order to regain control of the Hotel. Pickel also sought interest expense on a construction loan he alleged could not be refinanced at a lower rate due to the pending Local Action, as well as punitive damages. While the adversary was pending, Pickel transferred all of AVIC's rights under the Agreement to himself in his individual capacity and dissolved AVIC.[11]

The bankruptcy court conducted a trial on the merits, and after hearing the testimony of Boehm and Pickel and reviewing the exhibits received, entered

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[9] (...continued)
supporting the bankruptcy court's finding that Boehm appeared to be evading Pickel in hopes of defeating his ability to cure the default.

[10] The bankruptcy court noted that nothing much had happened in the Local Action after the TRO was dissolved four days after it was granted. *Memorandum Opinion*, 493 B.R. at 266, ¶ 42.

[11] As a result, AVIC and debtor Pickel are used interchangeably in some instances herein.

judgment mostly in Pickel's favor. Applying the law of the Virgin Islands, which follows the American Law Institute's Restatements of the Law, the bankruptcy court determined that: 1) the Termination Letter Boehm delivered to Pickel on November 13 was ineffective because November 17 was the actual cure date under the Agreement; and 2) AVIC tendered a timely and adequate cure of the payment default prior to the correct cure date sufficient to avoid termination of the Agreement. The bankruptcy court then held that because Boehm's actions constituted an anticipatory breach, the Agreement was still binding. As a result, it ordered specific performance of the Agreement conditioned upon Pickel making the final payment.

With respect to Pickel's counterclaim for breach of contract, the bankruptcy court overruled Boehm's claim that she had simply been mistaken in interpreting the contract (which she thought should excuse her clear anticipatory repudiation). It determined that her breach of the Agreement had caused Pickel out-of-pocket damages of $2,800 for lost revenue during the short time AVIC was ousted from the Hotel. Additionally, as an element of contract damages, the bankruptcy court awarded $10,000, apparently relying on 5 V.I. Code § 541, a provision of Virgin Island territorial law that permits recovery of fees in some cases. This represented the attorney's fees that the bankruptcy court held AVIC was required to incur to dissolve the TRO Boehm had improperly obtained in the Local Action. But the bankruptcy court declined Pickel's request for interest expense and punitive damages.

The bankruptcy court also determined that Boehm may have improperly filed a lis pendens, thereby slandering Pickel's title to the Hotel. Notwithstanding that finding, the bankruptcy court declined to award damages for that alleged slander of title, noting that the lis pendens did not appear to have caused Pickel any real damage, and that he had made no effort to get it removed.

III. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[12] Because neither party elected to have this appeal heard by the United States District Court for the District of New Mexico, they have consented to appellate review by this Court. A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[13] Here, the bankruptcy court's judgment terminated the adversary proceeding, and therefore is final for purposes of appeal.

IV. ISSUES ON APPEAL AND STANDARD OF REVIEW

Boehm argues the bankruptcy court erroneously determined both that her Notice of Default was defective and that she anticipatorily breached the Agreement. She also claims Pickel failed to tender an adequate and timely cure of his default, that the bankruptcy court lacked jurisdiction to award attorney's fees for the TRO—an action over which it did not preside, and that it erred in finding she improperly filed a lis pendens against the Hotel.

For purposes of standard of review, decisions by trial courts are traditionally divided into three categories, denominated: 1) questions of law, which are reviewable *de novo*; 2) questions of fact, which are reviewable for clear error; and, 3) matters of discretion, which are reviewable for abuse of discretion.[14] Boehm's argument that the bankruptcy court was without jurisdiction to award

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[12] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[13] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[14] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

attorney's fees is a question of law. *De novo* review of legal questions requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[15] Boehm's assertions of error with respect to breach of the Agreement and cure of the default are underpinned by the bankruptcy court's factual findings. A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[16]

V. ANALYSIS OF ANTICIPATORY BREACH OF THE AGREEMENT

A. Defective Notice of Default

Boehm first argues that the bankruptcy court erroneously determined her Notice of Default was defective,[17] and that she anticipatorily breached the Agreement. The bankruptcy court stated, or at least implied, that the Notice of Default was defective because it contained an incorrect cure date. But the bankruptcy court also explained that the Agreement did not require the cure period to be stated in the Notice of Default, as Pickel was a sophisticated party capable of determining the correct cure date.

The bankruptcy court also concluded that Boehm was not required to send a corrected Notice of Default reflecting the correct cure period.[18] Therefore, Boehm's assertion that the bankruptcy court erred in determining the Notice of Default was defective is irrelevant because it is not necessary to its conclusion that she anticipatorily breached the Agreement. Instead, the critical aspects of the

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15 *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

16 *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

17 *Notice of Default, Exhibit F*, *in* Appellee's App. at 33.

18 *Memorandum Opinion*, 493 B.R. at 268.

bankruptcy court's holding regarding anticipatory breach of the Agreement concern the Termination Letter Pickel received on November 13,[19] and Boehm's alleged evasion of Pickel's attempts to cure the default.[20]

B. Anticipatory Breach

The bankruptcy court held that Boehm's Termination Letter "was plainly contrary to the Agreement, and constituted an anticipatory breach of the Agreement."[21] To support its conclusion, the bankruptcy court cited *United Corp. v. Reed, Wible and Brown, Inc.*[22] and *Bennington Foods, L.L.C. v. St. Croix Renaissance Group L.L.L.P.*[23] These two Virgin Islands cases apply §§ 244, 250, 251, 253, and 254 of the Restatement (Second) of Contracts (Restatement), as the Virgin Islands has statutorily adopted application of the Restatement.[24]

According to § 250 of the Restatement, a repudiation is:

> (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or

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19 *Termination Letter, Exhibit G*, *in* Appellee's App. at 34.

20 Boehm suggests Pickel was required to respond to her Notice of Default to both claim he had a longer period to cure and to indicate his intent to timely cure. Opening Brief at 12-13. Additionally, Boehm argues that nothing in her Notice of Default indicated she was not going to perform. Opening Brief at 13. But it is the Termination Letter that is the key to repudiation, not the Notice of Default.

21 *Memorandum Opinion*, 493 B.R. at 268.

22 626 F. Supp. 1255, 1257 (D.V.I. 1986).

23 2010 WL 1608483, at *10 (D.V.I. 2010).

24 The Virgin Islands statute provides as follows:

> **§ 4 Application of common law; Restatements**
>
> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

V.I. Code Ann. tit 1, § 4 (2013).

(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.[25]

Courts have held that in order to constitute repudiation, the party to a contract must make an absolute and unequivocal refusal to perform an obligation and that such obligation must be so essential to the purpose of the contract that nonperformance makes the agreement worthless.[26] While the Termination Letter clearly meets these requirements, Boehm argued she could not have repudiated the Agreement because she had no intent to do so. Instead, she claims because she was merely mistaken about the Agreement's default provision, she should not have been held to have repudiated it.[27]

The bankruptcy court correctly noted that Comment d to § 250 of the Restatement cautions that "[g]enerally, a party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty."[28] The bankruptcy court was also not convinced, after having the opportunity to assess her credibility, that Boehm had merely misinterpreted the default provision. Instead, it found there had been no "defensible but erroneous" interpretation, and suggested Boehm may have purposely elected to assert an interpretation she knew was wrong in an attempt to regain possession of the Hotel.[29]

Boehm also maintains that: 1) under § 251 of the Restatement, Pickel was required to assure her of his intent and ability to perform under the Agreement,

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25 Restatement (Second) of Contracts § 250 (1981).

26 *McCloskey & Co. v. Minweld Steel Co.*, 220 F.2d 101, 104 (3d Cir. 1955).

27 *Memorandum Opinion*, 493 B.R. at 269.

28 *Id.* at 270 (internal quotation marks omitted).

29 *Id.*

and he did not do so;[30] and 2) she had no obligation to render performance until Pickel made the final payment. Boehm concludes that she could not have breached the Agreement by merely sending Pickel the Notice of Default and Termination Letter, so it is really Pickel who breached the Agreement, not her.[31]

As a preliminary matter, it does not appear she made this argument to the bankruptcy court. Appellate courts consider issues that have not been decided by the trial court only in rare circumstances not present here.[32] But even were we to seriously consider this argument, there is no evidence to suggest Boehm made any demand for an assurance of performance from Pickel. She admits that after she issued the Notice of Default and the Termination Letter, there was no other communication between the parties. And frankly, what would she have had Pickel do to resuscitate the Agreement after she herself deemed the Agreement terminated, null and void?

As a result, we conclude Boehm has not demonstrated that the bankruptcy court erred in holding that she anticipatorily breached, or repudiated, the

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[30] That section of the Restatement provides as follows:

> **§ 251 When a Failure to Give Assurance May Be Treated as a Repudiation**
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> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

Restatement (Second) of Contracts § 251 (1981).

[31] Opening Brief at 14-15.

[32] *In re C.W. Mining Co.*, 625 F.3d 1240, 1246 (10th Cir. 2010) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

Agreement.

C. Tender of Adequate and Timely Cure by Pickel

Under § 253 of the Restatement, a party's repudiation of a duty under a contract gives rise to a claim for damages for total breach.[33] But a "party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise."[34] As explained in Williston on Contracts,

> the party claiming that an anticipatory repudiation has excused performance of a condition precedent must show that but for the repudiation, it would have been ready, willing, and able to perform its obligations under the contract, at least when the defendant–that is, the repudiating party–places in issue the ability of the plaintiff to perform.[35]

Therefore, a critical aspect of this case, and an intensely factual one, is whether Pickel tendered a timely and adequate cure, or was at least ready, willing, and able to do so.

Pickel maintained, and the bankruptcy court found, that he both: 1) tendered a check to Boehm's counsel on November 16, which was refused; and 2) had a check waiting for Boehm to pick up at the Hotel on November 17, and so

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[33] That section of the Restatement provides:

> **§ 253 Effect of a Repudiation as a Breach and on Other Party's Duties**
>
> (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
>
> (2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

Restatement (Second) of Contracts § 253 (1981).

[34] Restatement (Second) of Contracts § 254 (1981).

[35] Richard A. Lord, 13 *Williston on Contracts* § 39:41 (4th ed. 2013) (footnote omitted).

informed Boehm by leaving a message on her answering machine.[36] Boehm contends § 254 of the Restatement discharges her duty to pay damages for breach by repudiation because there is no evidence to support the bankruptcy court's findings that Pickel attempted to cure the default. Boehm further argues that, even if Pickel in fact tendered a check to cure the default, there remains a failure to perform because he admitted it was drawn on an account with insufficient funds to cover the payment.[37]

1. Tender of payment

In determining whether Pickel tendered a timely and adequate cure of the default, the first dispute concerns the proper place for, or manner of, making that payment. Although Boehm resided at the Hotel when the parties executed the Agreement, the parties clearly anticipated she would be vacating the premises within a couple months, if not sooner.[38] Nevertheless, the Agreement expressly directs all notices to Boehm be delivered or mailed to her at the Hotel,[39] but provides no place or method for making payment. The Note specifies that Pickel make payments to Boehm at the Hotel, "or at such other place as the holder hereof may from time to time designate in writing."[40]

The bankruptcy court held that Boehm never designated a different address for making payments, and Boehm certainly did not testify she did or otherwise seek to admit a copy of such a written designation at trial. She did testify that Pickel had made previous payments through the trust account of an attorney

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36 *Memorandum Opinion*, 493 B.R. at 263, ¶¶ 22, 23.

37 Opening Brief at 16.

38 *Agreement* at 1, ¶ 1, and 4, ¶ 7, *in* Appellant's App. at 312, 315. A payment of $25,000 was due on November 30, 2007, or when Boehm vacated the premises, if earlier.

39 *Id.* at 6-7, ¶ 16, *in* Appellant's App. at 317-18.

40 *Non-Negotiable Promissory Note* at 1, *in* Appellant's App. at 338.

named Lorin Kleeger, who brought the parties together for the sale transaction.[41] As a result of this payment history, she argues Pickel made no good faith attempt to present the final payment and cure the default because he "failed to utilize the common course of dealing in making payments" under the Agreement by not "sending payment to the trust account of his attorney."[42] This argument is not persuasive for several reasons.

First, only four payments were due under the Agreement. One payment was made upon execution of the Agreement, leaving only two other installment payments before the final payment at issue here. That makes a true "course of performance" difficult to establish. Second, and more importantly, the Note expressly provides for payment to Boehm at the Hotel and mentions nothing of an intermediary. Section 203(b) of the Restatement provides that the express terms of a contract are to be given greater weight than course of performance and course of dealing between the parties.[43]

Pickel testified that on November 16, one day prior to the cure deadline, his

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[41] *Transcript of Proceedings on May 30, 2013 ("Transcript")* at 17-18, *in* Appellant's App. at 64. It should be noted that ¶ 16 of the Agreement provides that notice to AVIC be given to Lorin M. Kleeger, Esq., suggesting Mr. Kleeger is AVIC's counsel. Apparently, however, Mr. Kleeger also represents Boehm in numerous matters. *Transcript* at 48-49, *in* Appellant's App. at 95-96.

[42] Opening Brief at 16.

[43] That section of the Restatement provides:

> **§ 203 Standards of Preference in Interpretation**
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> In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:
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> . . .
>
> (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade[.]

Restatement (Second) of Contracts § 203 (1981).

representative attempted to hand deliver a check to Boehm's attorney, Ezart A. Wynter, Sr. ("Wynter"), but that Wynter refused to accept it.[44] On appeal, Boehm argues there is nothing in the record to support the bankruptcy court's finding that the cure payment was tendered to Wynter because he "was never called as a witness to explain the affidavit the [bankruptcy] court relied on to say [ ] Wynter attempted to avoid receipt of the November 16, 2009 insufficient check."[45] The affidavit Boehm refers to was made by Wynter on January 4, 2010, in connection with her Local Action seeking declaratory judgment and injunctive relief.[46]

In the affidavit, Wynter stated he was contacted by Pickel's representative inquiring about Boehm's whereabouts and that he indicated he was unaware of Boehm's location, and additionally, that he was not authorized to accept any documents on her behalf. The affidavit states Pickel's representative "called" on November 13. It is uncertain whether "called" means contacted in person or by telephone, or whether the date of November 13 is accurate. What is important is that Boehm provided no evidence at trial to counter Pickel's evidence that his representative tried to tender the final installment payment to her own lawyer, except that she testified she was in constant contact with her lawyer and would have known if this had occurred.[47] No one stopped Boehm from calling Wynter to testify if she wished to rebut Pickel's version of events.

Further, Pickel testified that he personally left a telephone message for Boehm on November 16, advising her that the check was available for her to

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[44] *Transcript* at 134-36, 167, *in* Appellant's App. at 181-83, 214; *Exhibit H*, *in* Appellee's App. at 36.

[45] Opening Brief at 17.

[46] *Exhibit AA, Affidavit of Eszart A. Wynter, Sr.*, *in* Appellee's App. at 120.

[47] *Transcript* at 28, *in* Appellant's App. at 75.

retrieve at the Hotel on November 17.[48] Pickel also produced a contemporaneously written and witnessed account of that phone call.[49] Boehm testified she never received Pickel's message.[50]

The bankruptcy judge ultimately did what all trial judges have to do; he listened to the testimony of Boehm and Pickel and assessed their credibility. For good reason, Federal Rule of Bankruptcy Procedure 8013 requires that this Court give due regard "to the opportunity of the bankruptcy court to judge the credibility of the witnesses."[51] The bankruptcy court clearly believed Pickel's version of the events over Boehm's version. Accordingly, without any persuasive corroborative evidence to support Boehm's version of the events, we must accept the bankruptcy court's findings regarding tender of the cure payment.

2. Pickel's ability to make good on cure payment

Pickel tendered a full cure of the default in the form of a check drawn on his account at a New Mexico bank.[52] Boehm argues that Pickel admitted his account had insufficient funds to cover the payment, and that drawing and delivering a worthless check is a crime.[53]

At trial, Pickel testified he had made arrangements for a bank loan that would cover the check he tendered to cure the default.[54] That plan required him to notify the senior vice president loan officer at his bank the moment Boehm retrieved the check and to arrange to have the borrowed funds immediately

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48 *Transcript* at 134-36, 154-56, *in* Appellant's App. at 181-83, 201-03.

49 *Exhibit I*, *in* Appellee's App. at 37.

50 *Memorandum Opinion*, 493 B.R. at 263, ¶¶ 22-24.

51 Fed. R. Bankr. P. 8013.

52 Letter and Check dated November 16, *Exhibit H*, *in* Appellee's App. at 36.

53 Opening Brief at 16.

54 *Transcript* at 135-36, *in* Appellant's App. at 182-83.

wired.[55] Because Boehm was in the Virgin Islands, whereas the check was drawn on a New Mexico bank, this plan was intended to allow time for funds to be deposited in the account to cover the check before it was presented. Pickel also offered into evidence a copy of an email he received on the morning of November 17, from his lawyer arranging this transaction. The email confirmed that the loan documents had been prepared and the funds had been received.[56]

Once again, the bankruptcy court believed Pickel's version of these events, and found that Pickel credibly demonstrated he was ready, willing, and able to perform his obligations under the contract. Boehm failed to specifically contradict any of this evidence. As a result, there is no basis to reverse the decision.

D. Summary of Anticipatory Breach and Cure of Default

Boehm's arguments on appeal with respect to breach of the Agreement and cure of the default are based on her allegations that the bankruptcy court's factual findings were erroneous. Under the "clearly erroneous" standard of review, reversal is appropriate only if such findings are "'without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[57] The only witnesses appearing at trial were the parties themselves, perhaps because other witnesses were located in the Virgin Islands. As a result, the amount and type of evidence received was limited. But, after hearing and assessing the credibility of the witnesses and reviewing the documentary evidence, the bankruptcy court concluded that, rather than sincerely trying to collect the final $250,000 payment,

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[55] *Id.* at 154-56, *in* Appellant's App. at 201-03.

[56] *Exhibit CC*, *in* Appellee's App. at 129.

[57] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

at some point Boehm became more interested in getting back the Comanche stock (and thus the Hotel) she had sold to Pickel.[58]

According to the bankruptcy court, it was possible that to further that goal, Boehm may have intentionally "misinterpreted" the default provision in the Agreement, issued the erroneous Notice of Default and Termination Letter and refused to correct them, and then evaded Pickel's attempt to cure.[59] As the bankruptcy court opined, allowing Boehm to regain the stock using this ploy would be tantamount to a forfeiture, which is disfavored by the law.[60]

Pickel had already paid $550,000 of the $800,000 purchase price due under the Agreement. Additionally, Pickel testified he had spent almost $2 million repairing and improving the Hotel after the Agreement was signed,[61] and that the Hotel was now worth more than double what it had been worth when he signed the purchase Agreement with Boehm.[62] The stock covered by the Agreement represented a 42.6% interest in Comanche, and therefore likely had a value in excess of $2 million. To permit Boehm to regain the stock to satisfy Pickel's $250,000 outstanding debt would be inequitable, especially in light of Boehm's actions that were contrary to the Agreement.

Our review of the appellate record[63] demonstrates that there is more than

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58 *Memorandum Opinion*, 493 B.R. at 264, ¶ 32.

59 *Id.* at 270.

60 *Id.* at 271.

61 *Id.* at 264, ¶ 34.

62 *Id.* at 264-65, ¶ 35.

63 As to the record on appeal, Pickel filed a Motion to Strike Portions of Appellant's Joint Appendix ("Motion to Strike"), complaining about the documents Boehm submitted in Volumes XII and XIII of her Appendix. But two days after filing his Motion to Strike, Pickel filed his own Appendix, and it contains all but two or three of the very exhibits he now seeks to strike from Boehm's Appendix. At oral argument, Pickel's counsel admitted those additional

(continued...)

adequate factual support in the record for those findings. We are not left with the definite and firm conviction that the bankruptcy court made any mistake in these findings of fact. Additionally, we note the bankruptcy court appears to have reached its conclusions regarding anticipatory breach and evasion of cure attempts, in part, based on Boehm's pattern of behavior. It did not escape the bankruptcy court's attention, or ours, that in addition to this adversary proceeding, Boehm has been litigating matters related to the Hotel and Comanche's stock for 20 years in at least eight other civil actions.[64] We therefore affirm its decision that Boehm anticipatorily breached the Agreement and that Pickel tendered an adequate cure of the default, or at least was ready, willing, and able to do so.

VI. ANALYSIS OF ATTORNEY'S FEES AND LIS PENDENS

A. Attorney's Fees

The bankruptcy court awarded Pickel $10,000 for the attorney's fees AVIC incurred in dissolving the TRO in the Local Action, effectively finding that its efforts to dissolve the TRO were necessary for AVIC to regain possession of the Hotel and realize the benefit of its bargain. The bankruptcy court held that those fees were recoverable not as attorney's fees per se, but instead as an element of breach of contract damages.[65] Key to the decision is that the Virgin Islands does not follow the general "American Rule" that parties bear their own costs,

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[63] (...continued)
documents were of no consequence to his position on appeal, and indicated his Motion to Strike could be denied. We conclude the Motion to Strike was ill-advised as Pickel put essentially identical documents before this court for review and the few that were not duplicative were immaterial to the appeal. Accordingly, we deny his Motion to Strike as moot.

[64] *Memorandum Opinion*, 493 B.R. at 264, ¶ 33.

[65] *Id.* at 273.

expenses and fees, absent contractual or statutory provisions to the contrary.[66] Instead, under Virgin Islands law, attorney's fees may be allowed as an element of costs in the court's discretion.[67] The bankruptcy court determined that if Boehm had not breached the Agreement, and had she not sought the TRO, Pickel would not have incurred the $10,000 in expenses necessary to dissolve the TRO—classic breach of contract damages.

Boehm misunderstands the character of the award when she argues that the bankruptcy court "lacks jurisdiction to award attorney's fees in a case that was never before the court."[68] Admittedly, the Virgin Islands statute contemplates that the judge hearing the case who is familiar with the work involved and the services rendered has the authority to award such fees. But the bankruptcy court found credible Pickel's testimony that he had incurred $25,000 in defending the Virgin Islands litigation caused by Boehm's anticipatory breach, and that at least $10,000 of it was directly attributable to the TRO litigation itself.

Boehm questions the award of $10,000 in damages because Pickel did not introduce documentary evidence—such as an itemization of hours expended multiplied by the applicable hourly rate. While it is true that Pickel did not introduce an itemized accounting of the legal work performed, there is considerable other evidence in the record supporting the award.

First, the record contains the order dissolving the TRO, which recites that

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66 *Prosser v. Prosser*, 40 F. Supp. 2d 663, 671 (D.V.I. 1998) (holding that "[i]n the courts of the Virgin Islands[,] the American Rule against shifting fees to the losing party does not apply"), *rev'd on other grounds*, 186 F.3d 403 (3d Cir 1999); *Anderson v. Bryan*, No. ST-08-CV-545, 2013 WL 3215672, at *3 (V.I. June 24, 2013) (same).

67 V.I. Code Ann. tit 5, § 541 (West 2013). *But see Pan Am. Realty Trust v. Twenty One Kings, Inc.*, 297 F. Supp. 143, 151 (D.V. I. 1968), *aff'd*, 408 F.2d 937 (3d Cir. 1969) ("The amount to be awarded is wholly within the discretion of the judge *before whom the case has been tried* and who is, therefore, familiar with the work involved and the services rendered.") (emphasis added).

68 Opening Brief at 17.

AVIC filed an emergency motion to vacate the TRO the day after it was entered, and also that the hearing on that motion was held only three days later.[69] Pickel testified he had already paid his attorneys $15,000 in connection with this matter, and still owed them more.[70] He also testified that the billing rates of his two attorneys were $250 to $300 an hour, that they "were called out at 7:00 at night and worked through the night" in order to prepare an emergency motion to quash the TRO, and then "worked several hours each day that week in preparing for the hearing" on the TRO.[71] Boehm is simply incorrect that there was no evidence in the record to support the award.

While an itemized bill might have been more persuasive evidence, the bankruptcy court clearly found Pickel's testimony credible and believed that his attorneys would likely have needed to spend long hours over a very short period of time to prepare for, and attend, the hearing to dissolve the TRO. And at $250-$300 per hour for his two attorneys, an hourly rate Boehm does not challenge, it is not difficult to see how AVIC incurred $10,000 in fees.

Boehm knew or reasonably should have known that her election to breach the Agreement and have Pickel evicted from the Hotel would cause AVIC damages, including the attorney's fees required to dissolve the improperly acquired TRO. There is sufficient evidence in the record to support those fees as an element of damages for her breach. We decline, therefore, to reverse the bankruptcy court's award of $10,000 as an element of contract damages.

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[69] The Appellee's Appendix contains pleadings and orders from the Local Action, including the complaint, amended complaint, affidavit in support of TRO, order granting TRO, order staying TRO, and order dissolving TRO. *See Exhibits O through T, in* Appellee's App. at 58 to 78. Boehm obtained the ex parte TRO on Monday, December 14, 2009, and delivered it to Pickel that same evening. By 9:00 a.m. the next morning, Pickel filed the emergency motion to dissolve or vacate the TRO. The actual hearing on the TRO was held four days later.

[70] *Transcript* at 194-96*, in* Appellant's App. at 241-43.

[71] *Id.* at 195, *in* Appellant's App. at 242.

B. Improper Filing of Lis Pendens

Boehm's final argument is that the bankruptcy court erred in finding that she improperly filed a lis pendens against the Hotel. The bankruptcy court stated, or at least implied, the filing of the lis pendens was improper because Boehm had no personal claim against the property, as any claim would be held by the corporation, itself, not by her as an individual shareholder. Boehm's lis pendens argument is irrelevant to her appeal, however, because the bankruptcy court declined to award any damages in connection with Pickel's counterclaim for slander of title.[72]

VII. CONCLUSION

Boehm's appeal of the bankruptcy court's decision, which held that the Agreement remained in full force and effect, and thus both parties were entitled to specific performance of all their rights under the Agreement, is ultimately based on her disagreement with that court's factual findings. We cannot say that those findings, essentially that Boehm repudiated the Agreement and Pickel tendered a timely and adequate cure, are clearly erroneous. Therefore, the bankruptcy court's order is hereby AFFIRMED.

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[72] *Memorandum Opinion*, 493 B.R. at 274.