UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Case No. 3:07-bk-04295-JAF
NETBANK, INC.,	Chapter 11
Debtor.	
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ORDER DENYING CHIEF RESTRUCTURING OFFICER'S MOTION FOR SUMMARY JUDGMENT AS TO OBJECTION TO PROOF OF CLAIM FILED BY RAPHAEL T. BRAUCH, CLAIM REGISTER NO. 97, GRANTING IN PART AND DENYING IN PART RAPHAEL T. BRAUCH'S MOTION FOR SUMMARY JUDGMENT ON THE CHIEF RESTRUCTURING OFFICER'S OBJECTION TO CLAIM 97, AND OVERRULING IN PART AND SUSTAINING IN PART CHIEF RESTRUCTURING OFFICER'S OBJECTION TO PROOF OF CLAIM FILED BY RAPHAEL T. BRAUCH, CLAIM REGISTER NO. 97

This case came before the Court upon the Chief Restructuring Officer's Motion for Summary Judgment as to Objection to Proof of Claim Filed by Raphael T. Brauch , Claim Register No, 97 (the "CRO'S Motion for Summary Judgment"), Raphael T. Brauch's Motion for Summary Judgment on the Chief Restructuring Officer's Objection to Claim No. 97 (the "Brauch's Motion for Summary Judgment"), Raphael T. Brauch's Memorandum in Opposition to the Chief Restructuring Officer's Motion for Summary Judgment and in Support of Raphael T. Brauch's Motion for Summary Judgment (the "Memorandum in Opposition to the Motion for Summary Judgment and in Support of Brauch's Motion for Summary Judgment"), Response to Motion for Summary Judgment filed by Raphael T. Brauch (the "Response to Brauch's Motion for Summary Judgment"), and Raphael T. Brauch's Reply to the Chief Restructuring Officer's Response to Motion for Summary Judgment filed by Raphael T. Brauch (the "Reply"). Upon a review of the pleadings and the applicable law, the Court finds it appropriate to deny the Chief Restructuring Officer's Motion for Summary Judgment and to grant in part and deny in part Raphael T. Brauch's Motion for Summary Judgment.

Background

Debtor is a financial holding company. As a holding company, Debtor's only business was ownership of the stock of its subsidiaries. Netbank, FSB was a wholly owned subsidiary company of Debtor. Netbank, FSB is not a debtor in this Chapter 11 case.

Debtor filed a Chapter 11 bankruptcy petition on September 28, 2007, after which it operated as a debtor-in-possession. The Court established February 15, 2008, as the bar date for filing proofs of claim in Debtor's Chapter 11 case. On July 10, 2008, Debtor filed the Debtor's Amended Liquidating Plan of Reorganization (Docket No. 402) with the Bankruptcy Court, which it later amended on July 31, 2008 (Docket No. 420) (as amended, the "Plan"). On September 16, 2008, the Court entered an order confirming the Plan (Docket No. 475). Pursuant to the Plan, on the "Effective Date" (as defined therein)[1], Mr. Clifford Zucker of J.H. Cohn LLP was appointed as the Liquidating Supervisor. The Liquidating Supervisor is now the representative of the Debtor's bankruptcy estate, and as a result, he is authorized to review and analyze and, if and to the extent necessary, object to claims filed in the Debtor's Chapter 11 case. The Plan also provides, to the extent necessary, the Liquidating Supervisor may delegate the responsibility to object to claims to Lee Katz, Debtor's former Chief Restructuring Officer (the "CRO"), which the Liquidating Supervisor has done in this matter.

On February 1, 2008, Raphael T. Brauch ("Brauch") filed a general unsecured non-priority proof of claim in the amount of $643,172.00 (Claim Register #97) (the "Brauch Claim"). The purported basis for the amounts claimed in the Brauch Claim is the termination payment provision of the employment agreement between Debtor and Brauch entered into on April 1, 2002, and

[1] The Effective Date of the Plan was September 29, 2008.

subsequently amended on March 1, 2004 and again on March 14, 2006 (as amended, the "Employment Agreement").

On March 11, 2009, the CRO filed an objection to the Brauch Claim (Docket No. 789) (the "Objection"). On April 9, 2009, Brauch filed a response to the Objection (Docket No. 868) (the "Response"). On August 21, 2009 the CRO filed the Motion for Summary Judgment. On September 29, 2009 Brauch filed Brauch's Motion for Summary Judgment and the Memorandum in Opposition to the Motion for Summary Judgment and in Support of Brauch's Motion for Summary Judgment. On November 9, 2009 the CRO filed the Response to the Brauch Motion for Summary Judgment. On November 16, 2009 Brauch filed the Reply.

Undisputed Facts

Debtor is a depository institution holding company governed by 12 U.S.C. § 1821 and 12 C.F.R. § 359. (Ex. B Mot. For Summ. J). On April 1, 2002, the Debtor and Brauch entered into the Employment Agreement which was subsequently amended on March 1, 2004 and again on March 14, 2006. Section 3.4 of the Employment Agreement, on which the Brauch Claim is predicated, provides that Brauch shall receive a termination payment equal to two times his Annual Base Salary, the greater of two times his Incentive Compensation or the amount of any executive bonus pool to which Brauch might have been entitled, and continuation (for a twenty-four month period) of the benefits provided by section 4.3 of the Employment Agreement if Brauch is terminated prior to expiration of the "Term" of the Employment Agreement. Brauch was terminated on January 12, 2007, prior to expiration of the Employment Agreement. (Aff. of Raphael Brauch.)

In an attachment to the Brauch Claim, Brauch asserts that he is entitled to a claim in the total amount of $643,172.00, which is the sum of $350,000.00 (salary for a two year period), plus $262,500.00 (discretionary bonus payouts for two years), plus $18,000.00, representing health and insurance benefits.

In a letter dated November 2, 2006 the Office of Thrift Supervision (the "OTS"), the quasi-governmental entity charged with regulatory oversight of federal savings banks, advised NetBank, FSB that it had determined that NetBank, FSB was in "troubled condition." (Comp. Ex. A Mot. for Summ. J). The letter also indicated that "preliminary financial information for [Debtor] indicate[d] a consolidated loss for [Debtor] in excess of $70 million for the quarter. Such loss would amount to approximately 20 percent of [Debtor]'s GAAP capital as of June 30, 2006." (Id.)

On December 5, 2006 Debtor filed an application with the with the Federal Deposit Insurance Corporation (the "FDIC") seeking approval of certain termination payments pursuant to the "golden parachute" payment regulations found in 12 C.F.R. § 359, et seq. (Comp. Ex. B Mot. for Summ. J). The application included Brauch. (Id.) After several conversations with the FDIC, the December application was withdrawn by letter dated February 26, 2007 and new applications, including one for Brauch, were submitted. The new applications reduced the amounts sought. (Comp. Ex. B Mot. for Summ. J). At some point between February and before March 21, 2007, Keith Kilgore of the FDIC verbally advised the Debtor that such applications would not be approved because a portion of the payments represented cash payments in lieu of the provision of medical benefits. (Comp. Ex. C Mot. for Summ. J). In response, on March 21, 2007 Debtor filed revised applications deleting those payments. (Id.)

On March 21, 2007 the OTS sent a letter to Debtor indicating that it had revised Debtor's rating to unsatisfactory and that the rating change was effective as of that date. (Comp. Ex. A Mot. for Summ. J.) The letter noted that "due to the 'Unsatisfactory' rating assigned to [Debtor], and the previous notice to [Netbank, FSB] that it is in 'troubled condition' … [Debtor] is also designated as being in 'troubled condition…'" (Id.) The letter also indicated that Debtor had equity of $229 million as of December 31, 2006. (Id.)

On September 12, 2007, the OTS sent a letter to NetBank, FSB, in which, among other things, it imposed significant restrictions on payment of "any form of severance or bonus compensation." Specifically the letter provided that "effective immediately, Netbank [FSB] may not pay any form of severance or bonus compensation to its employees without the prior written non-objection of the OTS…[T]he restriction applies to all employees of [Netbank, FSB] or [Debtor] or any subsidiary, regardless of the existence of an employment contract." (Ex. D Mot. For Summ. J).

On September 18, 2007, the FDIC sent a letter to Netbank, FSB wherein it indicated that "some, if not all, of the proposed" severance payments constitute[d] golden parachute payments under 12 CFR § 359.1. (Ex. E Mot. For Summ. J). Neither the FDIC nor the OTS ever approved the payment of any terminations payment to Brauch pursuant to his Employment Agreement.

Initially, the CRO asserts that the Brauch Claim should be disallowed in its entirety pursuant to 11 U.S.C. § 502(b)(1) because it is a golden parachute payment and is therefore not allowable under non-bankruptcy law. Alternatively, the CRO asserts that Brauch's claim should be capped in accordance with 11 U.S.C. § 502(b)(7). The CRO seeks summary judgment on the golden parachute issue. Brauch seeks summary judgment on the golden parachute issue and on the issue of whether the claim should be capped.

Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56, incorporated by Federal Rules of Bankruptcy Procedure 7056 and 9014, "summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). "Summary judgment must be granted if as here, the Court is satisfied that no real factual controversy is present, so that summary judgment can serve its salutary purpose in avoiding a useless, expensive and time consuming trial where there is no genuine, material issue to be tried." In re Hoult, 243 B.R. 818, 823 (Bankr. M.D. Fla. 1999).

Application to the Instant Case

The Claim is Not Barred under 11 U.S.C. § 502(b)(1)

Section 502(b)(1) of the Bankruptcy Code provides that a claim may be allowed, except to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). See United States v. Sanford (In re Sanford), 979 F.2d 1511. 1513 (11th Cir. 1992) ("[A] claim against the bankruptcy estate will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy."). Entities such as the Debtor (a depository institution holding company) are prohibited from making golden parachute payments under applicable non-bankruptcy law. See 12 C.F.R. § 359.2 ("No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.") The CRO asserts that the Brauch Claim is unenforceable under applicable non-bankruptcy law because it is a golden parachute payment and should therefore be denied and disallowed in its entirety.

Chapter 12 of the C.F.R. § 359.1(f), provides in relevant part:

(f) Golden parachute payment.

(1) The term golden parachute payment means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former

IAP[2] pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.101(c) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

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[2] An "IAP" is an "Institution-affiliated party" which is defined as, among other things, "[a]ny director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company." 12 C.F.R. § 359.1(h)(1).

12 CFR § 359.1(f).

In order for a payment to be a golden parachute payment, the statute requires that the condition set forth in § 359.1(f)(1)(i) be met, that one of the conditions set forth in § 359.1(f)(1)(ii) be met, and that one of the conditions set forth in § 359.1(f)(1)(iii) be met. It is clear that the termination payment sought in the Brauch Claim is payable after Brauch's termination with Debtor, thus satisfying the condition set forth in § 359.1(f)(1)(i). It is also clear that the payment to Brauch would be made after the bankruptcy of Debtor, the entity making the payment, thus satisfying § 359.1(f)(1)(ii)(A). Section 359.1(f)(1)(iii)(A) applies to a payment made to a party who was employed by an insured depository institution. Section 359.1(f)(1)(iii)(B) applies to a payment made to a party employed by an insured depository institution holding company. Because Brauch was employed by Debtor, a depository institution holding company, subsection (iii)(B) applies. Subsection (iii)(B) requires that the payment be payable to an individual whose employment was terminated at a time when the *insured depository institution holding company* by which the individual was employed satisfies any of the conditions enumerated in subsection (f)(1)(ii)(A), (C), or (D)(emphasis added).

Brauch argues that the issue before the Court is whether Debtor, not Netbank, FSB met any of the conditions in subsections (f)(1)(ii)(A), (C), or (D) at the time he was terminated. Brauch contends that at the time he was terminated Debtor did not meet any of the conditions set forth in subsections (f)(1)(ii)(A), (C), or (D). The Court finds that based upon the plain language of subsection (f)(1)(iii)(B), Debtor, the insured depository institution holding company by which Burdsall was employed, not Netbank, FSB, must satisfy one of the conditions set forth in (f)(1)(ii)(A), (C), or (D) at the time Brauch was terminated.

At the time Brauch was terminated Debtor, the depository institution holding company making the payment, was neither bankrupt nor insolvent. Debtor filed its bankruptcy petition on

September 28, 2007, more than eight months after Burdsall's termination. Additionally, the November 2, 2006 letter from OTS to Netbank, FSB indicated that while Debtor had a loss of $70 million for the quarter ending September 30, 2006, such a loss was only twenty percent of Debtor's capital. The March 21, 2007 letter from the OTS to Debtor indicated that as of December 31, 2006 Debtor had equity of $229 million. Based upon its positive equity, Debtor's assets exceeded its liabilities at that time. Thus, the evidence on file does not demonstrate that Debtor was insolvent on January 12, 2007. Accordingly, (f)(1)(ii)(A) does not apply.

At the time Brauch was terminated by Debtor there had been no determination by Debtor's appropriate federal banking agency that Debtor was in troubled condition. The November 2, 2006 letter from OTS determined only that Netbank, FSB was in troubled condition. While the March 21, 2007 letter from OTS determined that Debtor was in troubled condition, because it specifically provided that the change was effective as of the date of the letter, Debtor was not determined to be in troubled condition until more than two months after Brauch was terminated. Accordingly, subsection (f)(1)(ii)(C) does not apply.

Finally, at the time Brauch was terminated, Debtor had not been assigned a composite rating of 4 or 5 or unsatisfactory. The November 2, 2006 letter from OTS assigned Netbank FSB, but not Debtor, a composite rating of 4. While the March 21, 2007 letter revised Debtor's rating to unsatisfactory, because it specifically provided that the change was effective as of the date of the letter, Debtor was not assigned an unsatisfactory rating until more than two months after Brauch was terminated. Accordingly, subsection (f)(1)(ii)(D) does not apply. Because at the time Brauch was terminated, Debtor did not satisfy (f)(1)(ii)(A), (C), or (D), the payment to Brauch is not a golden parachute payment.

The Law of the Case Does Not Apply

Alternatively, the CRO points out that the Court previously entered orders in which it

granted summary judgment in favor of the CRO and against similarly situated claimants. The CRO argues that these Orders are the law of the case and dictate that summary judgment be granted in favor of the CRO and against Burdsall. Specifically, on July 1, 2009 the Court entered Order Granting Liquidating Supervisor's Motion for Summary Judgment as to Objection to Proof of Claim filed by James P. Gross, Claim Register No. 132 (the "Gross Summary Judgment Order"). On September 30, 2009 the Court entered Order Granting Liquidating Supervisor's Motion for Summary Judgment as to Objection to Proof of Claim filed by Randall C. Johnson, Claim Register No. 81, Denying Randall C. Johnson's Motion to Strike, Denying Randall C. Johnson's Cross Motion for Summary Judgment, and Sustaining Liquidating Supervisor's Objection to Proof of Claim filed by Randall C. Johnson, Claim Register No. 81 (the "Johnson Summary Judgment Order"). In those matters, the Court found that severance payments sought by Gross and Johnson, former officers, directors, or key employees of Debtor constituted golden parachute payments pursuant to the terms of Chapter 12 , C.F.R. § 359.1(f) based upon the determination that Netbank, FSB was in "troubled condition".

Under the doctrine of the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). The doctrine promotes finality and judicial efficiency. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988). However, the doctrine of the law of the case only applies to issues actually considered and decided in prior litigation in the same case. See In re Cummings, 2008 WL 2059883 (11th Cir. 2008) (stating that law of the case only bars those legal issues actually decided in the former proceeding).

The Liquidating Supervisor failed to cite § 359.1(f) in its entirety in his Objections to the proofs of claim filed by Mr. Gross and Mr. Johnson. In the Objections, the Liquidating

Supervisor cited to § 359.1(f)(i) and f(1)(ii), but failed to cite to § 359.1(f)(1)(iii). Subsection (f)(1)(iii) was not cited in Mr. Gross' or Mr. Johnson's responses to the Liquidating Supervisor's Objections. In the Gross and Johnson Motions for Summary Judgment, the Liquidating Supervisor again failed to cite § 359.1(f)(1)(iii). Mr. Gross did not file a response to the Liquidating Supervisor's Motion for Summary Judgment. Mr. Johnson's response did not raise § 359.1(f)(1)(iii). Therefore, the Court was not presented with 12 C.F.R. § 359.1(f)(1)(iii) or the required conditions set forth in subsections (f)(1)(ii) (A),(C), and (D) in any of the Gross or Johnson pleadings. Accordingly, because § 359.1(f)(1)(iii) and the required conditions set forth in subsections (f)(1)(ii)(A), (C), and (D) were not presented to the Court, the Court did not address these subsections in the Gross and Johnson Orders and did not actually decide the issue of whether § 359.1(f)(1)(iii) and the requirements of subsections (f)(1)(ii)(A), (C), and (D) applied to Debtor at the time Gross and Johnson were terminated.[3] Thus, the law of the case does not apply to the Brauch Claim.

The Claim is capped pursuant to 11 U.S.C. § 502(b)(7)

Brauch argues that the termination payment is not future compensation which would have been earned if he had not been terminated. Brauch argues that it is simply unpaid compensation due under the Employment Agreement, without acceleration and the one year cap set forth in

§ 502(b)(7) does not apply. The Court finds that § 502(b)(7) applies. Accordingly, Brauch is entitled to a claim in the amount of $306,250.00, representing one year of base salary of $175,000.00 plus one year of incentive compensation of $131,250.00.

Conclusion

[3] Indeed the CRO only addressed the issue in this matter in response to Brauch's Motion for Summary Judgment.

Because the Brauch Claim is not a golden parachute payment, it is not unenforceable under applicable non-bankruptcy law and is therefore not barred by 11 U.S.C. § 502(b)(1). There is no genuine issue of material fact for trial and Brauch is entitled to judgment as a matter of law with respect to that portion of the CRO's Objection to Brauch's Claim. Section 502(b)(7) of the Bankruptcy Code applies to the Brauch Claim. Accordingly, the Brauch Claim will be capped in accordance with that section. There is no genuine issue of material fact for trial and the CRO is entitled to judgment as a matter of law with respect to that portion of the CRO's Objection to Brauch's Claim. Upon the foregoing, it is

1. The Chief Restructuring Officer's Motion for Summary Judgment as to Objection to Proof of Claim filed by Raphael T. Brauch, Claim Register No. 97 is denied.

2. Raphael T. Brauch's Motion for Summary Judgment is granted in part and denied in part.

3. The Chief Restructuring Officer's Objection to Proof of Claim filed by Raphael T. Brauch, Claim Register No. 97 is sustained in part and overruled in part.

4. Claim 97 filed by Raphael T Brauch is allowed as a general unsecured non-priority claim in the amount of $306,250.00.

DATED this 11 day of March, 2010 at Jacksonville, Florida.

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JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

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