

Set for hearing 2-6-15
9:00 A.M.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

JAN - 7 2015

TIM RHODES
COURT CLERK
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Oklahoma Department of Securities)
ex rel Irving L. Faught, Administrator,)
)
Plaintiff,)
)
vs.)
)
Seabrooke Investments, L.L.C., et al.,)
)
Defendants.)

Case No. CJ-2014-4515

**MOTION FOR ORDER INSTRUCTING ESCROW AGENT
TO DISBURSE ESCROW FUNDS TO QUAIL CREEK BANK**

COMES NOW Quail Creek and for its Motion for Order Instructing Escrow Agent to Disburse Escrow Funds to Quail Creek Bank ("Motion"), respectfully submits the following.

CURRENT DISPUTE AND RELIEF REQUESTED

As this Honorable Court is very well aware, this proceeding at one point involved the certain hotel known as the Bricktown Hotel and Convention Center (the "Hotel"). In November/December, 2014, a contract was obtained for the sale and purchase of the Hotel.

The Receiver agreed to the Bank being paid the principal amount owing and the unpaid accrued interest owing, but the Receiver refused to permit the Bank to be reimbursed for its attorney fees and costs.

In order to not jeopardize the sale of the Hotel, (which ultimately also paid off the second mortgage in full and also generated an approximate \$188,000 surplus that the Receiver is attempting to claim), the Bank agreed to place \$17,797.94 in escrow so that the sale could be closed.

The Escrow Agreement provides, in relevant part, that this Honorable Court should decide who is entitled to receive or be paid the \$17,797.94.

GENERAL BACKGROUND

1. Quail Creek Bank (“Bank”) made its first loan to Bricktown Capital, LLC, on approximately October 16, 2007, (the “Loan”).

2. The Loan was secured by a mortgage. The Loan was renewed at various times, and at all times the Loan remained secured by the mortgage.

3. In addition to the mortgage securing the Loan, the Loan was also secured by an “Assignment of Rents” which pledged all of the rents, profits, income, etc., generated by the Hotel.

4. From the time of the original Loan (October 16, 2007) to the date that the sale of the Hotel was closed on December 23, 2014, the Bank had a first mortgage and lien on the Hotel, and all of the Hotel’s rents, income, profits, contracts, etc., which such mortgage and lien were prior and superior to any other party.

5. On August 11, 2014, this lawsuit was filed against the Defendants, which included Bricktown Capital LLC. Bricktown Capital owned the Hotel.

6. When the Receiver was appointed, the Receiver immediately took control of the Hotel, including the Receiver taking control of all of the rents and income that the Hotel generated. The Receiver also took control of all bank accounts relating to the Hotel.

7. On September 9, 2014, the Court conducted a hearing. At that September 9, 2014, hearing, and after the Court heard many different arguments of counsel for various parties, Bank’s undersigned counsel made a recommendation to the Court regarding how to settle and resolve the issue involving the Hotel.

8. Upon hearing below-signed counsel's recommendation, the Court asked all other appearing counsel if they agreed with Bank's (below-signed) counsel's suggestions. All appearing counsel agreed, and the Court asked below-signed counsel to draft a "Supplemental Order" reflecting below-signed counsel's suggestions to this Honorable Court. Bank's counsel drafted the Supplemental Order, circulated the same for signature among all appearing parties, presented it to the Court for approval, and filed the same.

9. Notwithstanding Bank having a secured lien on all of the rents and income of the Hotel, the Bank agreed to not assert its secured lien status and to not object to the Receiver retaining \$44,076.69 of the rents and income, which benefitted the Receivership, rather than being paid to Bank against the indebtedness owing Bank.

10. Since the entry of the September 11, 2014, Supplemental Order, Bank's counsel did not actively participate in this proceeding, until certain events occurred shortly before the closing.

SIGNIFICANT EVENTS PRECEDING CLOSING

11. Defendants were successful in locating a buyer for the Hotel. To facilitate the sale of the Hotel, Stewart Abstract & Title Company was used to conduct the sale.

12. In furtherance of Stewart Abstract's efforts to close the sale, Stewart Abstract requested Bank to furnish a payoff statement. Per that request, Bank furnished a payoff statement which itemized all unpaid principal, all unpaid accrued interest, attorney fees, costs and bank charges that had been incurred by the Bank.

13. As briefly mentioned above, the Receiver would not agree to permit the closing of the sale of the Hotel unless the \$17,797.94 was placed in escrow.

14. Under no circumstances did the Bank want to jeopardize the sale of the Hotel which had a purchase price of approximately \$3,350,000, and therefore agreed to placing the \$17,797.94 in escrow as demanded by the Receiver so the sale of the Hotel could be closed.

BACKGROUND REGARDING THE AMOUNTS PLACED IN ESCROW

15. The original Loan was October 16, 2007. The first time that Bank incurred any attorney fees regarding the Loan was on November 23, 2010. From November, 2010, to when this lawsuit was filed, a time frame of approximately three years and nine months, the Bank incurred, and paid, attorney fees of \$10,836.68, costs of \$427.06, totaling \$11,263.74.

16. Since the filing of this lawsuit on August 11, 2014, to November 15, 2014, the Bank incurred \$5,972.33 in attorney fees, \$91.87 in costs, totaling \$6,064.20.

17. Per the Bank's payoff statement given to Stewart Abstract, the Bank also incurred \$50.00 for late charges and \$20.00 for the payoff letter fee, totaling \$70.00. Therefore, all attorney fees, costs, late charges and fees totaled \$17,397.94. (NOTE: There appears to be an unexplained difference of \$400.00, since \$17,397.94 was the amount owed to the Bank through November 15, 2014, (the date through the payoff statement), while there is \$17,797.94 in escrow.)

18. Since November 16, 2014, (the date of the payoff statement) to December 23, 2014, the Bank has incurred additional fees in excess of \$1,500.00 for drafting the Escrow Agreement per the Receiver's attorney's request, and other significant related matters to help ensure that the sale of the Hotel closed. That \$1,500.00 plus amount does not include attorney fees and costs incurred by the Bank after the payoff statement was provided (November 15, 2014), through the date of the closing, which was December 23rd.

COMPARABLE HOURLY RATES

19. In November, 2010, below-signed counsel charged Bank a \$160.00 hourly rate. Sometime between November, 2010, and December, 2014, (four years), below-signed counsel's rate increased from \$160.00 to the current rate of \$180.00.

20. Undersigned counsel submits that the hourly rate charge by the Bank is extremely reasonable, and frankly, surprisingly low. By comparison, the Receiver's attorney is charging the Receiver \$295.00 per hour, and the Receiver, who is an attorney, is charging \$265.00 per hour.

BENEFITS GENERATED BY BANK (AND BANK'S COUNSEL)

21. The Receivership benefitted from the Bank and Bank's counsel's actions in several ways, which include, but are not limited to, the following:

a. At the hearing on September 9th when the Plaintiff and the Defendants' respective counsel were aggressively disputing each other's positions regarding various matters involving the Hotel and whether or not Bank's Motion to Intervene should be sustained, Bank's below-signed counsel made a recommendation to the Court that would resolve all of the then disputed issues. Upon hearing the recommendation, the Court asked all other counsel if they were agreeable. Upon finding that all other counsel were agreeable, the Court asked below-signed counsel to repeat counsel's recommendation for the record and then draft the Supplemental Order regarding those suggestions.

b. The Bank agreed to not object to the Receiver retaining \$44,076.69 of the income generated by the Hotel, notwithstanding Bank's secured position with its mortgage and its Assignment of Rents, which specifically pledged all income

generated by the Hotel to the Bank. That resulted in the Receivership receiving a \$44,076.69 benefit.

c. Shortly before the closing, when the Receiver objected to the payment of Bank's attorney fees and costs, and at the Receiver's attorney's request, Bank's attorney drafted the Escrow Agreement, with the Receiver's attorney stating to below-signed counsel that by Bank's counsel drafting the Escrow Agreement, it would "save the Receivership money".

d. The Receiver's attorney also requested that Bank's counsel email him the MS Word version of the Escrow Agreement so it could be used as "a template" for an Escrow Agreement regarding the approximate \$188,000 net proceeds that remained after the closing.

e. The Receivership may potentially benefit in the amount of approximately \$188,000 by Bank agreeing to the "escrow" arrangement. If the Bank had been unwilling to close without being paid in full, the closing would not have occurred, and there would not be an approximate \$188,000 net remaining proceeds which the Receivership now claims.

f. In general, the Bank and below-signed counsel have cooperated with the Receiver and the Receiver's attorney; Bank and Bank's counsel have not caused the Receivership to incur unnecessary attorney fees or costs; and Bank gave the Defendants sufficient time to find a buyer for the Hotel, rather than rushing forward to file a foreclosure lawsuit. Bank's patience resulted in a successful closing and an approximate \$188,000 in remaining net proceeds that the Receiver now claims.

ARGUMENT AND AUTHORITIES

PROPOSITION I

THIS COURT IS AUTHORIZED TO ORDER THE RELEASE OF THE ESCROW FUNDS.

A receivership is a procedural vehicle to protect the underlying equitable rights of creditors. *Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶38. In protecting those equitable rights, this Court is given “flexible procedural rules to effectuate the protection of equitable substantive rights of those who participated in a business relationship.” *Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶38. Specifically, this Court is authorized under the Oklahoma Uniform Securities Act to “order such other relief as the court considers appropriate.” 71 O.S. § 1-603(C). Therefore, this Court is authorized under its broad statutory and equitable powers to order the release of the Escrow Funds to reimburse Bank for its attorney fees and costs incurred in connection with this matter.

PROPOSITION II

BANK’S MORTGAGE TAKES PRIORITY OVER ALL OTHER CLAIMS.

It is truly undisputed by all interested parties that at all relevant times the Bank had a first and prior mortgage, and a first and prior Assignment of Rents. Bank’s mortgage creates a lien upon the subject payment to secure payment of funds borrowed by Bricktown Capital. *See* 46 O.S. §42(3) (A mortgage is defined as “an instrument creating a lien upon real estate as security for payment of a debt.”) By virtue of recording its mortgage before that of any other creditor, Bank’s mortgage takes priority over all other claims. 42 O.S. §§ 15, 141.

In assessing Bank’s claim in the receivership assets, the Receiver is bound by the terms of the Mortgage. *See FTC v. NHS Sys.*, 708 F. Supp. 2d 456 (E.D. Pa., 2009) (holding

that a receiver acquires no greater rights in property than the receivership entities had previously). Any attempt by the Receiver to circumvent Bank's priority position must be rejected. The Oklahoma Supreme Court has long held that a "court will **not** authorize the incurring of indebtedness by a receiver of a private corporation and give said indebtedness priority over existing liens **without the consent of the lienholders.**" *Sinopoulo v. Portman*, 1943 OK 90, ¶11. [emphasis added]

PROPOSITION III

THE RECEIVER HAS AN AFFIRMATIVE DUTY TO PROTECT ALL CREDITORS, INCLUDING SECURED CREDITORS, AND NOT JUST A SELECT GROUP OF CREDITORS.

It is absolutely clear that the Receiver has an affirmative duty to represent ALL creditors, and not a select group of potential creditors.

A receiver is charged with protecting the investments of all the creditors, including that of any secured creditors. *SEC v. Byers*, 592 F. Supp.2d 532, 537 (S.D.N.Y. 2008). In protecting the creditors, the ultimate goal of a receivership is to maximize the recovery of the investors. *SEC v. Byers*, 637 F.Supp.2d 166, 176 (S.D.N.Y. 2009). In maximizing the creditors ultimate recovery, the receiver has a duty to avoid overly costly investigations, and at a certain point, cut off an investigation when the costs outweigh the benefits. *In re Equity Funding Corp. of Am. Secs. Litig.*, 603 F.2d 1353, 1365 (9th Cir. 1979).

Plaintiff, in its original motion for the appointment of a receiver, argued that a receiver is necessary:

- (1) to preserve the status quo while various transaction are being unraveled in order to determine an accurate picture of the fraudulent conduct, *SEC v. Manor Nursing Centers, Inc.* 458 F.2d 1082, 1105 (2d. Cir, 1972)

- (2) to **protect** those who have already been injured by a violator's actions from further despoliation of their property or rights, *Esbitt v. Dutch-American Mercantile Corp*, 335 F.2d 141m 143 (2d Cir. 1964) (internal citation removed)
- (3) to **prevent** the dissipation of the defendant's assets pending further action by the court, *SEC v. American Board of Trade, Inc.* 830 F.2d 431, 436 (2d Cir. 1987), or
- (4) to install a responsible officer of the court who could bring the companies into compliance with the law, *id.* at 436-437.

In essence, the Plaintiff's original justification for seeking a receiver was **to preserve and protect** the receivership property. Thus, the Receiver is required by the law of this state and the order of the Court to protect Bank and its secured rights in the Hotel and proceeds from the sale.

PROPOSITION IV

THE MORTGAGE CLEARLY AUTHORIZES BANK TO BE REIMBURSED ITS ATTORNEY FEES AND COSTS.

The Mortgage is clear. There can be no serious doubt that all indebtedness owing Bank by Bricktown Capital, LLC, was and is secured by Bank's mortgage. In concise relevant part, the original 2007 mortgage states:

"All such expenses (incurred by Bank) will become a part of the indebtedness and... be added to the balance of the note..."

"...all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interests or the enforcement of its rights shall become part of the indebtedness (owing by Bricktown Capital)."

"Grantor (Bricktown Capital) also will pay any court costs, in addition to other sums provided by law."

"The Mortgage will also secure payment of these amounts."

Accordingly, Bank has a right to be reimbursed all of its attorney fees and costs incurred in this matter. The Receiver is bound by the terms of the Mortgage. As the Oklahoma Supreme Court has explained:

The receiver of an insolvent, nongoing corporation takes the property of the company **for the creditors, subject to such equities, liens, or incumbrances**, whether created by operation of law or by act of the corporation, which existed against the property at the time of his appointment. *Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶38 [emphasis added]

Instead of working with and protecting Bank's interest, the Receiver has put itself at odds with Bank by refusing to permit Bank to be paid the remaining amounts owing Bank. This refusal is in direct violation of a receiver's clear duty to protect the investments of all the creditors, including that of any secured creditor. *SEC v. Byers*, 592 F. Supp.2d 532, 537 (S.D.N.Y. 2008).

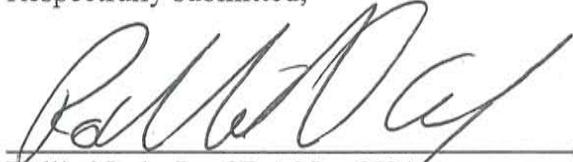
CONCLUSION

WHEREFORE, premises considered, Quail Creek Bank respectfully requests this Honorable Court to issue its Order directing Stewart Abstract & Title of Oklahoma to immediately disburse and pay to Quail Creek Bank all of the \$17,797.94 that Stewart Abstract has in its possession pursuant to the Escrow Agreement.

FURTHER, Quail Creek Bank requests that the Court award it any and all other relief that is deemed just and proper.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

This certifies that on the 7th day of January, 2015, a true and correct copy of the above document was emailed to the following:

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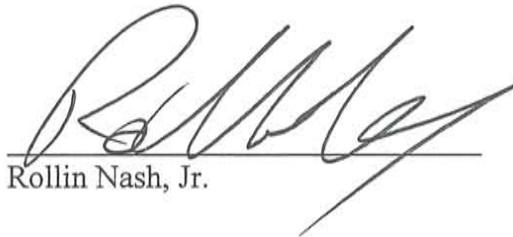
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