

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PNC BANK, N.A.,	:	
Plaintiff,		
v.	:	Case No. 3:12-cv-369
GATOR PIQUA PARTNERS, LLLP, <i>et al.</i> ,	:	JUDGE WALTER H. RICE
Defendants.	:	

DECISION AND ENTRY OVERRULING DEFENDANT’S MOTION FOR RECONSIDERATION (DOC. #15); SUSTAINING RECEIVER CBRE’S MOTION FOR HEARING ON MOTION FOR ORDER SPECIFYING AUTHORITY AND COMPENSATION OF RECEIVER (DOC. #36); TELEPHONIC ORAL ARGUMENT TO BE HELD ON AUGUST 22, 2013, AT 5:00 P.M.

This case involves a retail shopping center known as Piqua Plaza. After Defendant Gator Piqua Partners, LLLP (“GPP”), defaulted on a Promissory Note, PNC Bank, N.A. (“PNC”), the holder of the Promissory Note, filed suit against GPP and James A. Goldsmith, the Guarantor on the Promissory Note, seeking foreclosure and other relief.

After a Consent Judgment in Mortgage Foreclosure was issued, Doc. #11, the Court appointed CBRE, Inc. (“CBRE”), as a Receiver “to maintain the subject Property and to collect the rents, issues, incoming profits derived from the Property, and to preserve and/or sell the Property in order to protect the interests of all concerned.” Doc. #14.

This matter is currently before the Court on Defendant GPP's Motion for Reconsideration (Doc. #15), and on Receiver CBRE's Motion for Hearing on Motion for Order Specifying Authority and Compensation of Receiver (Doc. #36).

I. Background and Procedural History

On October 12, 2007, James A. Goldsmith ("Goldsmith"), as Manager and Sole Member of Gator Piqua, LLC, the Sole General Partner of Gator Piqua Partners, LLLP ("GPP"), executed a Promissory Note in the principal amount of \$2.5 million, in connection with the purchase of Piqua Plaza shopping center. Plaintiff PNC Bank is the current holder of the Promissory Note. After GPP defaulted on the Note, PNC filed a Complaint seeking judgment against GPP in the amount of \$1,695,749.25, plus interest. Pursuant to the terms of a related Guaranty, PNC also sought judgment against Goldsmith in the amount of \$593,512.24. In addition, PNC sought foreclosure, an order of sale, and the appointment of a receiver. Doc. #4.

On November 13, 2012, at GPP's request, the Court issued a Consent Judgment in Mortgage Foreclosure. Doc. #11. The Consent Judgment foreclosed "all right, title, lien and equity of redemption which said Defendant . . . had in the Premises and Assets known as Piqua Plaza" and ordered that "the Premises be sold at foreclosure, with a Special Master appointed . . . to conduct said foreclosure sale." The sale proceeds were to be deposited into the Court's registry account until the Court determined amounts due under the Note. Doc. #11.

Before a Special Master was appointed, however, the Court, on November 30, 2012, sustained PNC's Motion to Appoint Receiver, Doc. #12, and appointed CBRE, Inc. ("CBRE") "as receiver to maintain the subject Property and to collect the rents, issues, incoming profits derived from the Property, and to preserve and/or sell the Property in order to protect the interests of all concerned." Doc. #14.

II. Defendant's Motion for Reconsideration (Doc. #15)

On December 7, 2012, GPP filed a Motion for Reconsideration of the Court's November 30, 2012, Decision and Entry Sustaining PNC's Motion to Appoint Receiver. Doc. #15. "District courts have authority both under common law and [Federal Rule of Civil Procedure] 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment." *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004). Typically, however, a court will do so only when there is: "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Id.*

GPP notes that the Court appointed CBRE as a Receiver before the deadline had expired for GPP to respond to PNC's motion. GPP now argues that the Court should reconsider that Decision and Entry, and overrule PNC's Motion to Appoint Receiver, in order to prevent "manifest injustice."

With respect to equity receiverships, the Sixth Circuit has explained:

A district court enjoys broad equitable powers to appoint a receiver over assets disputed in litigation before the court. The receiver's role, and the district court's purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary. *See* 13 Moore's *Federal Practice* ¶¶ 66.02–.03 (3d ed.1999). As an officer of the court, the receiver's powers are coextensive with his order of appointment. *Id.*

Once assets are placed in receivership, a district court's equitable purpose demands that the court be able to exercise control over claims brought against those assets. The receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets.

Liberte Capital Grp., LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006).

GPP argues, however, that the appointment of a receiver is “an extraordinary remedy that is only justified in extreme situations.” *Aviation Supply Corp. v. RSBI Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993). Factors to be considered include “the validity of the claim by the party seeking appointment; the probability that fraudulent conduct has occurred or will occur to frustrate the claim; imminent danger that property will be concealed, lost or its value diminished; inadequacy of legal remedies; lack of less drastic equitable remedy; and the likelihood that appointment will do more good than harm.” *De Boer Structures (USA), Inc. v. Shaffer Tent & Awning Co.*, 187 F. Supp.2d 910, 925 (S.D. Ohio 2001).

GPP maintains that when these factors are considered, there was no need for the Court to resort to the “extraordinary remedy” of appointing CBRE as a

Receiver.¹ GPP contends that the balance of harms does not weigh in favor of appointing a Receiver. Fraud has not been alleged. According to GPP, there is no imminent danger that the property will diminish in value, nor is there any danger that the real property -- the asset that secures the loan -- will be depleted. It notes that CBRE had listed the property for sale at an amount greater than what is owed on the Promissory Note. GPP maintains that legal remedies are adequate. It also argues that a less drastic equitable remedy is available, in the form of an order appointing CBRE as a Special Master to conduct a foreclosure sale.

PNC notes, however, that Section 17 of the Mortgage specifically provides that, in the event of default, the Bank "shall be entitled to the appointment of a receiver . . . with the power to manage and operate the Mortgaged Property, to collect the rents, issues and profits of the Mortgaged Property," during the pendency of the foreclosure action. Ex. A to Doc. #20.

PNC further argues that the appointment of a Receiver is necessary to protect the value of the property. PNC contends that it is unlikely that GPP will be able to fully satisfy the debt out of sale proceeds. Including interest, GPP still owes more than \$1.7 million on the Promissory Note. Even though the property was listed for sale at \$2 million, no one offered to buy the property at that price.

¹ GPP also maintains that CBRE was not qualified to be appointed as a Receiver because CBRE, which was already serving as GPP's real estate agent, was not "an indifferent person," *i.e.*, a neutral entity. See *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 n.2 (6th Cir. 2006) (quoting 1 *Clark on Receivers* §11(a) (3d ed. 1959)). That agency relationship, however, was terminated as a matter of law as soon as the Court appointed CBRE as Receiver.

In addition, it is not clear that GPP has adequate resources to fully maintain the premises. PNC notes that the property is nearly vacant, with a current occupancy rate of only 6%. Dollar General is the only remaining tenant. There is a danger that the property will fall into further disrepair and will deteriorate in value, making it more difficult to attract new tenants.

PNC also points out that a Special Master would simply auction the property at a foreclosure sale. A Receiver, however, can maintain and manage the property to maximize its value. When the Receiver eventually liquidates the property with the Court's permission, it may be able to obtain a higher price by marketing the property through traditional channels. PNC correctly notes that although the Mortgage does not specifically give the Receiver the power to "sell" the property, neither does it specifically prohibit it.

In this case, the appointment of a Receiver was authorized by the terms of the Mortgage itself, and was necessary to protect PNC's interest in the property. Because GPP has failed to show that the Court's Order appointing CBRE as a Receiver must be overturned to prevent manifest injustice, the Court **OVERRULES** GPP's Motion for Reconsideration. Doc. #15.

III. Receiver CBRE, Inc.'s Motion for Hearing on Motion for Order Specifying Authority and Compensation of Receiver (Doc. #36)

On March 27, 2013, Receiver CBRE filed a Motion for Order Specifying Authority and Compensation of Receiver. Doc. #31. It asks the Court for

authority to: (1) engage CBRE as the property manager as set forth in the Management Agreement attached to the motion, effective as of the date of its appointment as Receiver; (2) negotiate and execute an extension of the Dollar General lease; (3) borrow funds sufficient to operate the shopping center and make necessary repairs; and (4) market and sell the shopping center. It asks the Court to enter the Supplemental Order Appointing Receiver, which was attached to the motion, and to establish compensation at the rate of \$500 per month, over and above any management fee, effective as of the date of its appointment as Receiver.

On April 22, 2013, Defendants filed a Memorandum in Opposition to CBRE's Motion. Doc. #35. Defendants argue that expanding the Dollar General space and extending the lease term may limit or decrease the value of the Premises by encumbering it with restrictions that limit other potential uses and hamper redevelopment. Defendants also object to certain provisions in the proposed Management Agreement.

On April 30, 2013, CBRE filed a Motion for Hearing on Receiver CBRE Inc.'s Motion for Order Specifying Authority and Compensation of Receiver. Doc. #36. It notes that until the Court defines and specifies the Receiver's authority, CBRE is hamstrung in its attempt to carry out its duties. Defendants oppose the request for a hearing. Doc. #37.

The Court finds that a hearing would be useful to clarify Defendants' objections to CBRE's Motion for Order Specifying Authority and Compensation of

Receiver, both with respect to the proposed Management Agreement and the proposed Supplemental Order Appointing Receiver. It therefore SUSTAINS CBRE's Motion for a Hearing, Doc. #36. Oral argument, via telephone, will take place on August 22, 2013, at 5:00 p.m.

IV. Conclusion

For the reasons set forth above, the Court OVERRULES Defendant Gator Piqua Partners LLLC's Motion for Reconsideration, Doc. #15, and SUSTAINS Receiver CBRE's Motion for Hearing on Receiver CBRE Inc.'s Motion for Order Specifying Authority and Compensation of Receiver, Doc. #36. Telephonic oral argument will be held, and a status report given, on August 22, 2013, at 5:00 p.m.

Date: August 5, 2013



WALTER H. RICE
UNITED STATES DISTRICT JUDGE