

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

Case No.: 8:09-cv-87-T-26TBM

v.

ARTHUR NADEL; SCOOP CAPITAL,
LLC; SCOOP MANAGEMENT, INC.

Defendants.

SCOOP REAL ESTATE, L.P.; VALHALLA
INVESTMENT PARTNERS, L.P.;
VALHALLA MANAGEMENT, INC.;
VICTORY IRA FUND, LTC; VICTORY
FUND, LTD; VIKING IRA FUND, LLC;
VIKING FUND, LLC; and VIKING
MANAGEMENT, LLC,

**LA BELLASARA CONDOMINIUM ASSOCIATION'S
MOTION FOR PARTIAL RELIEF FROM STAY
TO PERMIT THE FILING OF A LIEN IN THE PUBLIC RECORDS**

La Bellasara Condominium Association, Inc. ("Association") moves the Court pursuant to the Court's Order Reappointing Receiver (Doc. 493, ¶15), Fed. R. Civ. P. 66, and alternatively 60(b)(6), to permit the Association to protect its interests by allowing the Association to perfect its Claim of Lien, and ultimately, file a Claim of Lien in the Official Records of Sarasota County for unpaid assessments involving Unit 703 at La Bellasara Condominium, the unit the Receiver previously took title from Mr. Moody, as Trustee. This action would not adversely affect the Receiver's ownership interest of Unit 703. In support, the Association states:

1. This Motion concerns the Association's interest in the unpaid assessments due the Association relating to Unit 703 within the La Bellasara Condominium in Sarasota County. This Motion seeks permission to provide a notice of unpaid assessments and thereafter file a Claim of Lien in the Official Records for unpaid assessments. This Motion does *not* seek the Receiver to pay the assessments at this time. Instead, this Motion simply seeks to protect the Association's interest for when there is a sale of Unit 703.

2. In January 2010, the Receiver filed a motion with the Court seeking immediate possession and title to Unit 703. (Doc. 324). At that time, Neil V. Moody, as the Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, held title to the property.

3. By Order dated January 28, 2010, the Court granted the motion. (Doc. 327). In that Order, the Court stated that "title to, and the immediate possession of, the real property located at 464 Golden Gate Point, Unit 703, Sarasota, Florida, is vested in the Receiver." Id. at p.1. Continuing, the Court directed that "Neil V. Moody, as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, is directed to cooperate with the Receiver in effectuating the immediate transfer of title and possession of this property from the Trust to the Receiver." Id. at pp. 1-2.

4. On February 11, 2011, the Quit-Claim Deed effectuating that transfer was recorded in the Official Records of Sarasota as Instrument # 2011016633. That Quit-Claim Deed was signed on December 3, 2010. A copy of that deed is attached as Exhibit 1.

5. No assessments have been paid since January 1, 2011 for Unit 703. To date, the amount of the unpaid assessments totals over \$77,233.78, exclusive of attorney fees.

This amount continued to increase, as the next assessment became due on October 1, 2013. As discussed below, the Receiver is obligated under Florida law to pay these assessments.

6. The governing condominium documents require each unit owner to pay the assessments imposed by the Association, which is attached as Exhibit 2, ¶15, p.2-15.

7. The assessments imposed by the Association provide for common expenses that benefit Unit 703, as well as all other units. For instance, the assessments pay for insurance, security, pool and spa care, termite treatment/pest control, and otherwise maintain the condominium, to name a few.

8. Previously, the Association gave notice to the Receiver of the intent to file a claim of lien. The Receiver responded by advising the filing of the Claim of Lien would run afoul of the Court's Order appointing the Receiver.

9. The Association thereafter requested the Receiver to consent to file the entry of an Order for the Partial Lifting of Stay to permit the Association to file a Claim of Lien and potentially foreclose on that lien. Alternatively, the Association discussed the possibility of the Receiver stipulating to such an Order and a payment plan. The Receiver objected to both of those proposals.

10. Now, the Association is narrowing its request even further by simply requesting the Court for permission to perfect its lien by (1) providing an updated notice of unpaid assessments; and (2) thereafter file a Claim of Lien for unpaid assessments in the Official Records of Sarasota County. The Claim of Lien would give notice to any potential purchaser of the existence of the unpaid assessments. The Association hastens to add if it is authorized by the Court to file this Claim of Lien that the Association may not foreclose on

that lien absent further permission from the Court. The Association has no intent at present to seek permission from this Court to take the foreclosure step, provided the Receiver continues to market the property for sale (and not leasing or otherwise operating Unit 703). Filing the Claim of Lien is a step designed to protect the Association to recoup those unpaid assessments at the time of sale, which is when the Association anticipates the unpaid assessment issue to be resolved.

11. The existence of the Claim of Lien should not impact the Receiver at all, as the Claim of Lien in this situation will simply provide notice to potential purchasers of the past due assessments. The Claim of Lien does not establish the obligation to pay the assessment -- Florida law and the governing condominium documents established that obligation.

12. It does appear to the Association that the Receiver has been offering Unit 703 for sale through a realtor; however, to date it appears that the Receiver has not had success in effectuating a sale of Unit 703. It does not appear to the Association that the Receiver is seeking to lease Unit 703 or otherwise taking steps to operate Unit 703 for compensation. Presumably, the Receiver is advising prospective purchasers of the unpaid assessments. However, the only way for the Association to protect its interest is by filing a Claim of Lien.

13. Because of the time period that has elapsed since the Association served its previous notice, the Association would initially serve an updated notice, a draft of which is attached as Exhibit 3.

14. The Association also attaches as Exhibit 4 a draft copy of the Claim of Lien it proposes to file in the Official Records, which in an updated form would be filed after the expiration of the 30-day period, or waiver of that period of time by the Receiver.

MEMORANDUM OF LAW

Florida law provides for condominium associations the power to assess unit owners. § 718.111(4), Fla. Stat. Florida law also provides that a unit owner, "regardless of how his or her title has been acquired . . . is liable for all assessments which come due while he or she is the unit owner." § 718.116(1)(a), Fla. Stat. That statute further provides that "a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title." Liability for the assessments may not be avoided "by waiver of the use or enjoyment of any common element or by abandonment of the unit for which the assessments are made." § 718.116(2), Fla. Stat. Thus, the Receiver is statutorily required to pay these condominium assessments, as will be the person purchasing the condo.

In compliance with Florida law and the governing condominium documents, the Association has been imposing assessments, which remain unpaid with respect to Unit 703.

The Court appointed the Receiver and set forth the Receiver's powers in the various Orders appointing and reappointing the Receiver. (Docs. 8, 140, 316, 493). The Association is unaware of any provision of the Court's Orders empowering the Receiver with lien stripping, cram down, or other similar powers to avoid the payment of the on-going assessments.

The Receiver has taken the position that the Court's Orders appointing the Receiver preclude the Association from even filing a Claim of Lien in the Official Records. Paragraph

15 of the previous orders appointing Receiver (Docs. 8, 140, 316), enjoined all persons from prosecuting an action that affected the property or taking steps that would disturb the assets of the Receivership. Paragraph 15 of the Order Reappointing Receiver (Doc. 493), similarly provides:

Without prior permission from this Court, during the period of this receivership all persons, including creditors, banks, investors, or others, with actual notice of this Order, are enjoined from filing a petition for relief under the United States Bankruptcy Code or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Receivership Entities[.]

Nothing in those Orders, however, absolves the Receiver, or the ultimate purchaser of the condo unit, of the on-going assessments.

The Association is aware of the obligations of the Receiver. And the Association is not interfering with those obligations. Instead, the Association simply is seeking permission to protect its own interest with respect to the unpaid assessments. This Motion is being filed in compliance with the Court's Order Reappointing Receiver (Doc. 493, ¶15), which contemplates that those seeking relief from the stay seek "permission from this Court[.]" Moreover, as the receivership is governed by the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 66, an alternative basis for relief is Rule 60(b)(6), which provides relief may be had for "any reason that justifies relief."

Congress has announced a policy that Receivers are to comply with state law in the management and operation of the Receiver's assets. 28 U.S.C. § 959(b). The Association is aware of the Eleventh Circuit's decision in In re N.P. Min. Co., Inc., 963 F.2d 1449, 1460-61 (11th Cir. 1992), in which the court applied the statute to only those actions associated with

the active operation and management of a business enterprise, not where a receiver is simply maintaining the status quo. Here, it appears that the Receiver is simply trying to sell Unit 703, which arguably is the maintenance of the status quo in this situation. It does not appear that the Receiver is actively leasing the unit, which indisputably would make the statute application. While 28 U.S.C. § 959(b) may not *compel* the Receiver to make the on-going assessments in this situation, nothing about the statute absolves the Receiver from making the payments, even if such payments are made upon the sale of Unit 703. Moreover, nothing in the statute would prohibit the filing of the Claim of Lien. The only impediment is the stay contained in the Court's Orders appointing the Receiver.

Because the filing of the Claim of Lien would not adversely impact the Receiver, the Court should grant the Association's motion and permit it to file its demand, and thereafter, its Claim of Lien in the Official Records of Sarasota County, Florida, in the forms of Exhibits 3 and 4. The reason a fresh demand is being sought is that section 718.121(4), Florida Statutes, requires a 30-day notice before a lien may be filed, and the prior demand was made two years' ago. In all events, should the amount of the lien increases prior to receipt of permission to take these steps, the Association requests that it be permitted to include the updated amounts then due on Exhibit 3 and 4 when such are served and filed.

LOCAL RULE 3.01(g) CERTIFICATION

On October 1, 2013, undersigned counsel provided Mr. Gianluca Morello, counsel for the Receiver, a draft of this motion. On October 11, 2013, undersigned counsel and Mr. Morello spoke by telephone concerning this motion. Counsel for the Receiver has advised that the Receiver opposes the relief requested in this Motion. Further, on October 11, 2013,

undersigned counsel spoke with Mr. Bob Levenson, counsel for the SEC. Counsel for the SEC has advised that the SEC does not take a position with regard to the motion.

Respectfully submitted,

/s/ Hunter W. Carroll
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*Please note, effective October 28, 2013, the MATTHEWS EASTMOORE firm is relocating, and its new address will be:

1626 Ringling Boulevard, Ste. 300
Sarasota, FL 34236-6815

CERTIFICATE OF SERVICE

I CERTIFY on this 15th day of October, 2013, that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to Mr. Gianluca Morello, counsel for the Receiver, and all counsel of record.

/s/ Hunter W. Carroll