UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants. CASE NO.: 8:09-cv-0087-T-26TBM

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

Relief Defendants.
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THE RECEIVER'S SUR-REPLY IN OPPOSITION TO BB&T'S MOTION FOR TURNOVER OF SALE PROCEEDS OF FAIRVIEW PROPERTY SUBJECT TO MORTGAGE INTEREST

Branch Banking and Trust Company's ("**BB&T**") reply memorandum (the "**Reply**") (Doc. 1168) in further support of its motion (the "**Motion**") (Doc. 1159) for turnover of proceeds from the sale of 131 Garren Creek Road, Fairview, N.C. (the "**Fairview Property**"), contains nothing that overcomes the indisputable reality that BB&T's requested relief is time-barred by Federal Rules of Civil Procedure 60(b)(1) ("**Rule 60(b)(1)**") and 60(c)(1) ("**Rule 60(c)(1)**").[1] As in the Motion, BB&T's main argument in its Reply is that it was not required to file a Proof of Claim ("**POC**") because the Receiver knew of BB&T's security interest in the Fairview Property. But once again, BB&T cites no authority applying that argument in a federal equity receivership like this one. Critically, even if BB&T is correct – which it is not – it still does not change the fact that BB&T's purported claim and pursuit of its interest in the Fairview Property was barred and enjoined by this Court's March 2, 2012, Order (the "**March 2012 Order**") (Doc. 776), and the relief requested by BB&T is now time-barred. BB&T botched the handling of its purported claim and the aftermath of having failed to submit a POC, and now that Rule 60 precludes it from any relief, it only has itself to blame.

I. THE RELIEF SOUGHT BY BB&T IS UNEQUIVOCALLY TIME-BARRED UNDER RULE 60(c)(1)

A. The Plaint Language Of The March 2012 Order Barred And Enjoined BB&T's Purported Claim And Pursuit Of Its Interest

The arguments in the Reply do not impact the reality that BB&T's requested relief is time-barred by Rule 60(c)(1). The Court's April 21, 2010, Order ("**April 2010 Order**") stated,

[1] Terms not defined in this filing have the meaning ascribed to them in Burton W. Wiand, as Receiver's (the "**Receiver**") opposition to the Motion (the "**Opposition**") (Doc. 1163).

> Each person or entity that asserts a claim against the Receivership arising out of or related in any way to the acts, conduct, or activities of the Receivership Entities must submit an original, written Proof of Claim … to the Receiver … **to be received on or before [the Claim Bar Date (i.e., September 10, 2010)] ….** Any person or entity that fails to submit a Proof of Claim to the Receiver on or before the Claim Bar Date (i.e., fails to take the necessary steps to ensure that the Proof of Claim is received by the Receiver on or before the Claim Bar Date), shall be forever barred and precluded from asserting any claim against the Receivership or Receivership Entities ….

(Doc. 391 (emphasis in original).)[2] Under the plain language of that Order, every person or entity with a claim to Receivership assets had to ensure that a POC was "received" by the Receiver by the Claim Bar Date. Nothing in that Order exempted secured creditors like BB&T or other creditors of which the Receiver was aware, from submitting a POC and otherwise complying with those procedures. BB&T concedes it did not comply with that Order.

The Court's subsequent March 2012 Order directed that,

> To bring finality to these matters and to allow the Receiver to proceed with distributions of Receivership assets, any and all further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant … or any other public or private person or entity and any all proceedings or other effects to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate are hereby barred and enjoined absent further order from this Court.

(Doc. 776 ¶ 8.) Because BB&T failed to file a POC relating to the Fairview Property as required by the April 2010 Order, any claim it may have had and any efforts to pursue it were

[2] The Receiver's motion granted by the April 2010 Order was clear: the purpose of a deadline for submitting claims (the "**Claim Bar Date**") is to establish "a filing deadline for all claimants holding claims against the Receivership Entities (including investors), arising in any way out of the activities of the Receivership Entities (the "Claimants"), to assert a claim (the "Claim Bar Date")…. **Claimants must file claims in order to participate in any distribution of Receivership assets**." Doc. 390 at 5 (emphasis added).)

barred and enjoined by the March 2012 Order. At that point, Rule 60(c)(1) gave BB&T only one year to seek reconsideration of that bar and injunction.[3] BB&T concedes it did not do that.

Reply Sections C and G try to sidestep the time-bar. Specifically, they argue that: (1) BB&T essentially had a "standing" claim because of its secured interest and thus did not have to file a POC and (2) Rule 60(c)(1)'s deadline was never triggered because the March 2012 Order supposedly did not adjudicate its purported claim, and after BB&T emailed to Receiver's counsel a copy of a POC for the first time on April 26, 2012,[4] the Receiver neither made a determination of that purported claim nor submitted it to the Court for adjudication. BB&T's arguments are wrong. In relevant part, the March 2012 Order approved the determination of claims set forth in Exhibits B through J to the Determination Motion (Doc. 776 ¶ 3), and "any and all further claims … and any and all proceedings or other eff[orts] to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate [were] … barred and enjoined absent further order from this Court" (id. ¶ 8). As such, even assuming arguendo that BB&T had a "standing" claim, that purported claim and any efforts to pursue BB&T's interest in the Fairview Property were unequivocally barred and enjoined by the March 2012 Order. If BB&T believed the Court should have considered its purported "standing" claim

[3] Although BB&T does not specify which Rule 60(b) sub-section applies – presumably because doing so would concede defeat – all of its arguments fall within Rule 60(b)(1): "mistake, inadvertence, surprise, or excusable neglect."

[4] BB&T concedes it cannot show that it submitted the POC by the September 10, 2010, Claim Bar Date or at any other time before the March 2012 Order was entered.

rather than barring and enjoining it, then it was supposed to challenge the March 2012 Order under Rule 60(b)(1) within a year.[5] For unexplained reasons, BB&T instead elected to do nothing for almost three years.

As a result, when on April 26, 2012, BB&T's counsel for the first time emailed Receiver's counsel a copy of a POC relating to the Fairview Property (see Morello Decl. Ex. E (Doc. 1164)) after Receiver's counsel informed BB&T's counsel the claim was precluded by "failure to submit a claim …, the expiration of the deadline for submission of claims, and the [March 2012 Order] … barring and enjoining any further claims" (see Morello Decl. Ex. D), BB&T's purported claim unequivocally had already been barred and enjoined by the March 2012 Order. Importantly, under Rule 60(c)(1), at that point BB&T still had approximately 10 months to seek reconsideration of the March 2012 Order's bar and injunction of BB&T's purported claim and efforts to pursue it, yet BB&T did nothing for almost three years. Obviously, BB&T counsel's email to Receiver's counsel did not set aside the bar or lift the injunction, and the Receiver had no obligation to seek relief on BB&T's behalf. At minimum because of the notice that Receiver's counsel gave to BB&T's counsel on April 26, 2012, that BB&T's claim was precluded, BB&T's apparent belief that it had satisfied its obligations by sending that email was both wrong and unreasonable. Had BB&T sought relief from the Court's bar and injunction within a year of the March 2012 Order, its motion would have been timely, but instead it did nothing for almost 3 years.[6]

[5] BB&T also could have tried to appeal that Order, but as the record reflects, it never noticed an appeal.

[6] Even if BB&T's purported claim was not time-barred, it has not established excusable neglect for the reasons stated in the Opposition. (See Doc. 1163 at 18-20.) The Reply (at

B. BB&T's Attempt To Distinguish The Court's Previous Adjudication Of Elendow's Claim Objection Misses The Point

Reply Section D's attempt to distinguish Elendow's claim objection because the Receiver specifically recommended denial of that untimely claim in the Determination Motion misses the point. Reply at 4. According to BB&T, "[b]y contrast, the Receiver was aware of BB&T's secured claim well before the deadline, obviating a formal claim, see Bankers Trust, and the Receiver has not filed a claims determination on Fairview or asked the Court to approve such a determination." Id. This ignores that although, unlike Elendow's claim, BB&T's purported claim was not specifically addressed in the Determination Motion's exhibits, the March 2012 Order barred and enjoined "any and all further claims … and any and all proceedings or other eff[orts] to enforce or otherwise collect on any lien, debt, or other asserted interest in or against … Receivership Property." Doc. 776 ¶ 8. So, while Elendow's claim was denied by operation of paragraph 3 of that Order because it was specifically addressed in an exhibit to the Determination Motion, BB&T's purported claim and efforts to pursue that interest were barred and enjoined by paragraph 8 of that Order. Thus, contrary to BB&T's assertion, it, like Elendow, needed to

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page 2) asserts these circumstances constitute excusable neglect, but even assuming the initial failure to timely submit a POC was due to a mailing or other administrative error, BB&T's failure to take any steps to correct that failure for almost three years is not excusable neglect The Reply (at page 9) also continues to argue the Receiver cannot show prejudice because granting the Motion would not "force return of payments, affect planned distributions, harm reorganization, or prompt like claims." But there are already like claims – Wells Fargo Bank, N.A., has raised similar arguments about its failure to file POCs (Doc. 740).

seek relief from the March 2012 Order within one year under Rule 60(c)(1).[7]

II. EVEN ASSUMING ARGUENDO THE RELIEF SOUGHT BY BB&T WAS NOT TIME-BARRED, THE RECEIVER'S KNOWLEDGE OF BB&T'S LOAN AND SECURITY INTEREST DOES NOT ENTITLE BB&T TO RELIEF

The Reply, like the Motion, heavily relies on an argument that BB&T did not have to submit a POC to protect its interest in the Fairview Property because the Receiver knew of that interest, and purportedly under Bankers Trust Co. v. Florida East Coast Ry. Co., 31 F. Supp. 961, 963 (S.D. Fla. 1940), there was "no substantial reason for requiring further proof of such claim." As a dispositive matter, however, as explained above in Section I, even assuming BB&T is correct, the March 2012 Order still barred that purported claim and further efforts to pursue it, and BB&T's sole recourse in this Court was to seek relief under Rule 60(b)(1) within one year of that Order. It did not do that, and thus the Motion should be denied. But even assuming arguendo it had timely sought relief, BB&T's argument is wrong for two additional independent reasons.

First, although BB&T treats Bankers Trust as though it controls here, in reality it does not because it is a bankruptcy case and its pertinent issue was governed by Section 77 of the Bankruptcy Act.[8] Id. at 962. In this federal equity receivership, in contrast, the Bankruptcy

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[7] Even Wells Fargo Bank, which BB&T notes similarly failed to timely submit POCs (Mot. at 14, n.12), recognized it had to seek relief under Rule 60(b). See Doc. 740 (seeking relief under Rule 60(b)).

[8] The petition in Bankers Trust was "based upon Section 77, sub. n, of the Bankruptcy Act…." 31. F. Supp. at 962. Section 77 was added to the Bankruptcy Act by the Railroad Bankruptcy Act of 1933. "That section contains provisions for the reorganization of railroads engaged in interstate commerce. It permits any railroad corporation which is insolvent or unable to meet its debts as they mature to effect a plan of reorganization." Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 662 (1935). "Congress, by section 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the

laws do not govern. See Opp'n § III.A. In concluding the Bankers Trust claimant did not have to file a POC to preserve her claim, the court explained the Bankruptcy Act "fixes no time limit within which claims covered by said Act are to be filed, and the Court has no power to attach such conditions. The Act provides that these claims shall receive preferential payment, and no time limit for filing is provided." Bankers Trust, 31 F. Supp. at 963. The court added: "The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms." Id. In other words, the Bankruptcy Act gave the Bankers Trust claimant a statutory right to file her otherwise untimely claim, and the court lacked authority to reject it. Here, BB&T's purported claim is not governed by the Bankruptcy Act, the Bankruptcy Code, or any other statute, and the Court had authority to impose the Claim Bar Date and to enforce its orders and deadlines. Further, although Bankers Trust noted that in the context of that railroad reorganization proceeding a claim deadline was merely necessary to provide notice of claims, as discussed in the next Section, in this federal equity receivership initiated following the collapse of a massive Ponzi scheme, the finality imposed by the Claim Bar Date and subsequent bar and injunction has at least equal importance to the Receivership as does the notice of claims it provides. In short, like Elendow, BB&T was required to file a timely POC, but it did not – nothing in Bankers Trust or in any other case excuses that failure.[9]

Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is 'unable to meet its debts as they mature.'" Id. at 672.

[9] Bankers Trust is BB&T's sole defense to the Receiver's argument that the Motion should be denied because BB&T did not satisfy its burden of proving that it timely submitted a POC

Second, BB&T's argument that a claimant need not file a POC when a receiver has knowledge of its claim creates unnecessary and expensive burdens, precludes receivers from distributing assets, and quite simply, it defeats a primary reason for establishing claims process procedures with deadlines in equity receiverships: avoiding disputes like this one over untimely claims. The Receiver arguably may have had "knowledge" of practically every possible claimant and claim when he and his professionals seized Arthur Nadel's and the Receivership Entities' records in early 2009 and subsequently investigated their affairs. Indeed, the Receiver used all of that information to develop a list of potential claimants and then mailed them claims process materials. Under BB&T's theory, the mailing was an enormous waste of time and resources because none of those claimants had to return a completed POC by the Claim Bar Date – or ever, for that matter – because the Receiver had "knowledge" of their claims. BB&T's argument is illogical and unworkable for four independent reasons. First, because it is contrary to governing caselaw requiring "logical, fair, and reasonable" (Doc. 776 at 3) procedures for claims processes (Doc. 390 at 12-13). Second, because it would shift the burden to receivers to spend even more resources to conduct exhaustive and comprehensive detailed factual and legal investigations into every possible claimant and claim to determine the existence, amount, and validity of every potential claim. Indeed, if a receiver had any inkling of a secured creditor, that receiver plausibly would have to scour the public records of every U.S. jurisdiction to confirm whether or not such a creditor existed. Third, the distribution of receivership assets would be

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relating to the Fairview Property. See Reply at 2. Because that case is factually and legally distinguishable, the Motion should be denied on this independent basis as well.

unnecessarily delayed because no assets could be distributed until the receiver's exhaustive investigation of every single possible claimant and claim was complete – a receiver cannot determine claimants' share of the receivership's assets until the totality of claims is known. And fourth, undoubtedly in most circumstances in which the Receiver missed a claim, additional time- and money-wasting litigation would ensue over what the receiver knew and when he or she knew it. Indeed, this dispute has already involved four legal briefs and declarations with both parties attempting to recollect and gather communications from years ago, and avoiding such wasteful, ad hoc litigation is a primary reason for requiring POCs and enforcing claim bar dates. In short, contrary to Bankers Trust, the Claim Bar Date was not just a vehicle for notice of claims, but it imposed the finality that was critical for allowing the Receiver to distribute money to victims in an efficient and prompt manner.

III. CONSISTENT WITH THE COURT'S RESOLUTION OF FULCRUM'S OBJECTION, THE COURT SHOULD NOT APPLY BANKRUPTCY LAW HERE EITHER

Although the Reply attempts to distinguish cases the Receiver cited to show that secured creditors sometimes have to file formal claims even under the Bankruptcy Code (see Reply at 6-8), it never addresses this Court's rejection of bankruptcy law principals in the resolution of Fulcrum's claim objection:

> Any attempted analogy between the significance of a proof of claim under bankruptcy law with respect to any presumption of its validity and one submitted in the course of this equity receivership is unavailing. This Court's order approving the claims determination established the objection procedure and specifically found the procedure to be "logical, fair, and reasonable."

(Doc. 1061 at 8 (quoting Doc. 776 at 3; emphasis added).) BB&T has not identified any compelling reason to depart from that reasoning in this dispute, and to do so would open the

door to the significant issues and burdens discussed above in Section II. The Court's orders regarding the claims process were clear and unequivocal: they did not create any exception for secured creditors or, more broadly, for creditors of which the Receiver was aware. BB&T knew it had to file a POC by the Claim Bar Date to preserve its security interest in the Fairview Property because it did precisely that for a different Receivership Property and it even prepared a POC relating to the Fairview Property, which it failed to submit. BB&T's illogical and unworkable arguments under the Bankruptcy Code developed years later to overcome its botched handling of a claim do not warrant imposing the issues and burdens on receiverships that those arguments would generate.

IV. THE AMOUNT OF ANY BB&T CLAIM SHOULD INCLUDE A DEDUCTION FOR THE RECEIVER'S EXPENSES

Section I of the Reply concedes that if the Court grants the Motion, BB&T's purported claim should be limited to the unpaid principal amount stated in the POC BB&T failed to submit, but consistent with the Laurel Property determination, the Receivership's fees and expenses should also be deducted if the Court grants BB&T's Motion. See Doc. 675-5 (BB&T entitled to proceeds "up to the Allowed Amount less fees and expenses incurred by the Receivership to maintain and sell the Laurel Cottage").

CONCLUSION

For these reasons, and those discussed in the Opposition, the Court should deny BB&T's motion for turnover and release all of the proceeds from the sale of the Property to the Receivership estate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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