

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

CASE NO. 8:09-cv-87-T-26ATBM

v.

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

Defendants,

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.

**RENEWED MOTION TO ALLOW THE
FIRST NATIONAL BANK OF ALBANY/BRECKENRIDGE
TO GO FREE OF THE STAY TO ENFORCE ITS SECURITY INTEREST
IN ASSETS OF QUEST ENERGY MANAGEMENT GROUP, INC.
AND MEMORANDUM OF LAW**

COMES NOW, FIRST NATIONAL BANK OF ALBANY/BRECKENRIDGE, a National

Bank ("FNB"), by and through their undersigned attorneys, and moves to intervene and for relief from the stay to allow it to enforce its liens against collateral owned by Quest Energy Management Group, Inc. ("Quest"), due to default on note obligations, and as grounds therefore states as follows:

STATEMENT OF FACTS

1. On May 24, 2013, the Court approved the Receiver's Motion to expand the scope of receivership to include Quest.

2. Quest appealed this decision, but the Court's Order has been affirmed in the 11th Circuit Court of Appeals. (Docket 1139).

3. FNB is a secured creditor of Quest.

4. FNB has a first lien on a house located on lots 1 and 2, block 36, in the town of Albany, Texas, in Shackelford County, Texas which secures an installment note in the amount of \$76,000, a copy of the note being attached hereto as Exhibit "A". The note was modified on April 17, 2012 and is attached hereto as Exhibit "B". The balance due on the note as of July 22, 2016 is \$47,462.49, with a per diem interest of \$7.97 which remains outstanding and unpaid since May 17, 2013.

5. Additionally, Quest borrowed from FNB \$700,000 on October 13, 2010, secured by a second lien on oil and gas leases, a copy of the lease is attached hereto as Exhibit "C". The deed of trust, mortgage, security agreement, assignment of production and financing statement of willing gas properties is attached hereto as Exhibit "D". The note was modified on February 26, 2013, is attached hereto as Exhibit "E". The balance due as of July 22, 2016 on this note is \$151,747.66, plus per diem charges since July 22, 2016. The last payment was made on May 22, 2013. FNB does not believe there is any equity in the gas leases because there is a first lien on the gas leases.

6. The loan documents contain cross collateralization clauses, so between the house and the gas leases, there is no equity for the Receiver to liquidate..

7. Previously, on September 5, 2013, FNB sought to intervene to enforce its security interests. (Docket 1065). This Court denied the Motion. (Docket 1073).

8. Since the filing of this Motion, approximately 3 years ago, the appeal that was filed by Quest has been concluded allowing Quest to be included in this receivership. Accordingly,

this Court is no longer divested of jurisdiction because of a pending appeal.

9. FNB has received no payments in the past three (3) years, and the property secured by mortgages and liens has not been maintained by the Receiver.

10. The property taxes on the real estate have been unpaid, and FNB is concerned because under Texas law, the taxes are superior to contractual liens. The tax certificates for Quest properties being Certificate Nos. 4473, 4474, 4475, 4476 and 4477 are attached hereto as Composite Exhibit "F" and are in excess of \$200,000 owed to the Shackelford County Tax Collector.

11. FNB is also concerned with the statute of limitations fast approaching for FNB to bring an action to foreclose on its mortgage liens which under §16.035 of Texas is Civil Practice and Remedies Code will expire if suits to foreclose are not brought within four (4) years after the accrual of the cause of action. Quest defaulted on both notes in May of 2013, and therefore the statute of limitations would expire in May of 2017, unless FNB is given relief from stay to foreclosure on its liens.

12. The Receiver has not done anything to pay taxes; maintain the property or preserve the value of the properties. Notwithstanding the Receiver has tried to market and sell the property, the Receiver has not been successful.

ARGUMENT

13. Previously, when FNB filed its Motion to Intervene, (docket 1065), Quest's appeal was pending. Accordingly, FNB believed intervention was a proper procedure to seek relief from the stay. However, with the Eleventh Circuit's affirmation of this Court's Order including Quest in the receivership, FNB believes, as a secured creditor of Quest, intervention is unnecessary, and Rule 24 of the Federal Rules of Civil Procedure is inapplicable.

14. FNB seeks relief from the stay so it can enforce its secured interests; because it will soon lose its lien rights and rights to sue on the promissory notes due to statute of limitations that are fast approaching.

15. If this Court believes Rule 24 applies, this Court still should grant FNB's motion.

16. Rule 24 of the Federal Civil Procedure permits intervention as follows:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene through:

(1) is given an unconditional right to intervene by federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interests, unless existing parties adequately represent that interest.

17. FNB has a mortgage lien on real property owned by Quest. The taxes on the real property have not been paid, as shown by the attached Composite Exhibit "F" tax certificates. Additionally, the real property owned by Quest, that secures Plaintiff's lien, has been allowed to deteriorate.

18. Finally, the statute of limitations, under Texas law, requires non-judicial foreclosure sales to be made within four (4) years after the cause of action matures. Texas Civil Practice Remedy Code §16.035. After the expiration of the four (4) years, the real property lien and power of sale to enforce it become void. See C.P.R.C. §16.035 (d).

19. In response to FNB's prior Motion to Intervene, the Receiver argued FNB had no right to intervene under Rule 24(a)(2) because of its failure to establish the following elements: (1) that it was so situated that disposition of the action as a practical matter may impair or impede his ability to protect its interest; and (2) the parties to the action will not adequately represent its

interests. (citing Fox v. Tyson Foods, Inc., 519 F.3rd 1298, 1302-03 (11th Cir. 2008)). (Docket 1070).

20. FNB meets this standard, as the receiver is not protecting FNB's interest in the real property. The receiver is not paying insurance, or conducting any upkeep or maintenance of real property. The failure to pay taxes significantly diminishes Plaintiff's interests. The value of the real property diminishes by the failure of upkeep and maintenance, and by not paying the taxes, FNB's security is further diminished, as taxes will need to be paid when the property is sold.

21. The interim reports of the Receiver indicate it seeks to sell Quest, as an ongoing enterprise. Notwithstanding, the Receiver is not attempting to sell the real property, but instead unsuccessfully seek to sell Quest in its entirety. (Docket 1028). These efforts do not protect the interests of FNB.

22. The Receiver's decision to liquidate Quest in this manner, lengthens the process of liquidation, which allows the Receiver to continue to get paid, but denies secured creditors the rights and remedies permitted under the law.

APPLICABILITY OF EXCHANGE ACT SECTION 21(g) (15 U.S.C. §78u(g))

23. Exchange Act Section 21(g) provides in pertinent part that:

... no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

24. Previously, in response to FNB's prior Motion to Intervene, Plaintiff argued this section precluded intervention. (See docket 1069). In support of its argument, Plaintiff cited SEC v. Wozniak, 1993 WL 34702 at*1 (N.D. ILL. Feb. 8, 1993).

25. However, FNB believes a more thoughtful, and reasoned opinion is found at SEC

v. Kings Real Estate Inv. Trust, 222 F.R.D. 660 (D. Kan. 2004). Therein, the Court held Section 21(g) was designed to safeguard SEC enforcement actions against the application of multidistrict litigation rules, rather than to preclude intervention in such cases. It noted neither intervention, nor Rule 24 of the Federal Rules of Civil Procedure are discussed in the congressional history. Id., at 664. The court stated:

"The purpose of this subsection is simply to exempt the commission from the compulsory consolidation and coordination provisions applicable to multidistrict litigation. It does not say that no one may intervene in an action brought by the SEC without its consent. It does not mention Federal Rules of Civil Procedure 24, nor does Rule 24 contain any clause giving special privileges to the SEC." Id. (quoting SEC v. Flight transportation Corp., 699 F. 2d 943, 950 (8th Cir. 1983).

26. Accordingly, these cases, and the cases cited therein, demonstrates Section 21(g) is not an absolute bar to intervention. Therefore, as a secured creditor of Quest, FNB seeks relief from stay to enforce its legal rights under its security agreements with Quest. These rights are threatened by the passage of time, which allows the statute of limitations to expire, by the nonpayment of taxes on the secured property, and the continued failure to provide maintenance, maintain and upkeep on the properties.

27. While Rule 24(c) requires a pleading be attached to this Motion, because the bank only seeks relief from this day to enforce its lien against its collateral, it is respectfully submitted that this filing serves as a pleading required by the Rule. Piambino v. Bailey, 757 F.2d 1112, 1121 (11th Cir. 1985).

28. The Receiver has had more than adequate time to liquidate the assets of Quest. The Receiver ought not be allowed further time, particularly when as here FNB's lien may be time barred to foreclose their liens and the Receiver is doing nothing to protect FNB's lien rights while enjoying the benefits of the property subject to FNB's lien.

29. At a minimum the Court should allow FNB to start its foreclosure proceeding to avoid it being time barred due to the statute of limitations.

WHEREFORE, FNB respectfully requests this Court enter an Order granting its Motion to Intervene and to allow it to be free of the stay, to allow it to enforce its lien against the collateral secured by its mortgages and liens prior to it being barred by the statute of limitations, and for such other relief this Court deems appropriate.

COMPLIANCE WITH LOCAL RULE 3.01(G)

In accordance with Local Rule 3.1(G), prior to the filing of this Motion the undersigned attorney conferred with counsel for the Receiver and the SEC, and there could be no resolution on the Motions..

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record:



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