UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARTHUR NADEL, et al.,

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

SCOOP REAL ESTATE, L.P., et al.

Relief Defendants.
_____/

RECEIVER'S RESPONSE TO WELLS FARGO BANK, N.A.'S LIMITED OBJECTION TO RECEIVER'S UNOPPOSED MOTION TO APPROVE SIXTH INTERIM DISTRIBUTION AND INCREASE CERTAIN RESERVES

Burton W. Wiand, as Receiver ("**the Receiver**"), by and through his undersigned counsel, files this response to Wells Fargo Bank, N.A.'s ("**Wells Fargo**" or "**the Bank**") limited objection ("**Limited Objection**") to the Receiver's unopposed motion to approve sixth interim distribution and increase certain reserves.

In its Limited Objection, Wells Fargo raises concerns that the Receiver has not reserved enough funds from the Receivership Estate to satisfy the Bank's purported claims against the Receivership Estate. Specifically, the Bank submits that the Receiver should be required to reserve funds to satisfy in full amounts relating to three distinct matters. First, Wells Fargo asserts that its purported interest in the Rite-Aid Property and the claim it filed relating to that interest entitles it to $4,093,039.48 from the Receivership Estate. This

aggregate amount is the principal and interest ($2,655,000.00 and $1,046,007.29, respectively) on a loan made by the Bank that was secured by the Rite-Aid Property, plus professional fees of approximately $400,000 Wells Fargo asserts it has incurred enforcing its claimed interests in that property and which Wells Fargo asserts it has the right to recover under the terms of the note under which that loan was made. Second, it asserts that its purported interests in the Laurel Mountain Property and the Sarasota Property arising out of loans it made and serviced, respectively, which were secured by those properties entitle it to $806,121 in fees and costs from the Receivership Estate although it never filed a claim relating to either of those loans. Although Wells Fargo does not specify it in its Limited Objection, in its earlier filings it asserted that it was entitled to receive payment of these fees and costs under the terms of the notes under which the loans secured by Laurel Mountain and the Sarasota Property were made. (See Dkt. 689). Third, the Bank argues that it is entitled to receive from the Receivership Estate an additional $40,312.94 in costs awarded to it by the District Court in the matter of *Wiand v. Wells Fargo Bank, N.A.*, Case 8:12-cv-00557-JDW-EAJ, after it prevailed on summary judgment.

Wells Fargo's objections and requests are unfounded. First, as detailed more fully below, the Receiver has sold two of the Properties in which Wells Fargo claims an interest (*i.e.*, the Rite Aid Property and the Sarasota Property) and is holding in reserve the full amount of those net sale proceeds. In addition, though as discussed below the Bank is not entitled to any distributions in excess of the net sale proceeds of its collateral, in an abundance of caution, the Receiver has also reserved a total of $2,657,224.36 and is requesting to reserve an additional $111,963.37 for a total reserve amount in addition to the

net sale proceeds of $2,769,187,73. Second, the Limited Objection ignores governing case law establishing (1) that deficiencies resulting from collateral whose sale does not yield sufficient proceeds to fully pay a claim secured by that collateral are considered unsecured deficiency claims and (2) the need to file claims to preserve any right to recover attorneys' fees and costs that is based on a contractual provision that predates the claim bar date. Specifically, a recent Eleventh Circuit receivership case has clarified that anyone seeking payment of attorney's fees and legal costs from a receivership estate based on a contractual provision that predates the claim bar date must file a timely claim in the receivership's claims process. Here, although Wells Fargo bases its asserted rights to recover fees and costs on provisions in the notes evidencing loans secured by the Laurel Mountain Property and the Sarasota Property and those notes predate the claims bar date, it failed to file a claim to recover any amounts it asserts it is owed under the notes evidencing the loans secured by those two Properties. Finally, as previously noted, as a general rule, a claim is secured only to the extent of the value of the asset to which claimant's lien or security interest is fixed; the remainder of the claim, regardless of whether it is for unpaid principal, interest, penalties, or attorneys' fees, is an unsecured deficiency claim. Though Wells Fargo did not disclose this to the Court in its Limited Objection, in recent briefings before the Eleventh Circuit Court of Appeals concerning the Laurel Mountain Property and the Sarasota Property, **the Bank unambiguously conceded that it has no right to recover any deficiency claims in connection with the Properties because it did not file a claim in this case's claims process**.

The Rite-Aid Property

The Receiver sold the Rite-Aid Property in 2012 and received $2,229,463.15 in net proceeds, which are being held in reserve. In addition, the Receiver has already reserved an additional $539,048.24 in connection with the claim filed by Wells Fargo relating to its loan secured by the Rite Aid Property and is requesting to increase those reserves by $28,326.36[1] for a total reserve amount of $567,384.60.

In general, non-investor secured claimants are allowed to recover only from proceeds of the sale of the asset securing their respective interest up to the lesser of the outstanding amount of the valid claim or the proceeds of the sale of the collateral. As already noted, Wells Fargo filed a timely claim relating to its loan secured by the Rite-Aid Property[2]. However, its secured interest is limited to the proceeds of the sale of its collateral, which was $2,229,463.15. Any amount Wells Fargo claims it is owed relating to its loan secured by the Rite Aid Property which exceeds the net sale proceeds (*i.e.*, $2,229,463.15) (such as any unpaid principal, interest, penalties, or professional fees) constitutes an unsecured deficiency claim, and is thus afforded lower priority than the defrauded investor claims which will receive the interim distribution – in this claims process, the investor claims have been categorized as Class 1 claims and Wells Fargo's unsecured deficiency claim would be a Class 3 claim. *See In re J.H. Inv. Services, Inc.*, 452 Fed.Appx. 858, 860 (11th Cir. 2011) ("The unsecured portion of an undersecured claim is called a deficiency claim."); *see also In*

[1] This amount represents 1.52% (the percentage of distribution of the Allowed Amounts the Receiver is requesting (*See* Doc. 1253)) of the difference between what Wells Fargo claims it is owed ($4,093,039.48) and the net sale proceeds of the Rite-Aid Property ($2,229,463.15).

[2] The Receiver has recommended to the Court that this claim be denied because Wells Fargo was on inquiry notice of Nadel's fraud. (*See* Doc. 675, pp. 60-64). In addition, the Receiver disputes the Bank's assertion that it is entitled to any rents collected by the Receivership in connection with this Property. Furthermore, the Receiver has reserved amounts which exceed the total amount of rent payments collected by the Receiver.

re Scarver, 555 B.R. 822 (M.D. Ala. 2016) ("a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that lien is considered unsecured." (quoting *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). Because Wells Fargo's claim for any amount exceeding the net sale proceeds of the Rite Aid Property is a Class 3 claim which cannot be paid until all Class 1 claims have been paid in full, there is no need to reserve any funds in excess of the net sale proceeds because the interim distribution will be paid towards satisfaction of Class 1 claims which, even after this distribution, will still not be fully satisfied so Wells Fargo will still not be entitled to any money towards its Class 3 claim.

Laurel Mountain and Sarasota Properties

The Receiver sold the Sarasota Property in 2015 and received $2,147,993.69 in net sale proceeds, which are being held in reserve. The Receiver has already reserved an additional $1,079,905.98 and is requesting to increase those reserves by $43,350.12[3] for a total reserve amount of $1,123,256.10. The Laurel Mountain Property has not been sold so it remains part of the Receivership Estate. The Receiver has already reserved an additional $1,038,260.14 relating to Wells Fargo's asserted interest in the Laurel Mountain Property as a result of a loan it made that is secured by that Property and is requesting to increase those reserves by $40,286.89[4] for a total reserve amount of $1,078,547.03.

Wells Fargo did not file a claim for either the Laurel Mountain or Sarasota Properties. At most, the Bank will be entitled to the proceeds of the sale of the Laurel

[3] This amount represents 1.52% (the percentage of distribution of the Allowed Amounts the Receiver is requesting (*See* Doc. 1253)) of the amount Wells Fargo claims it is owed.
[4] This amount represents 1.52% (the percentage of distribution of the Allowed Amounts the Receiver is requesting (*See* Doc. 1253)) of the amount Wells Fargo claims it is owed.

Mountain and Sarasota Properties and any deficiency between the net sale proceeds and the amounts the Bank claims it is owed, including any unpaid principal, interest, penalties, or professional fees, will be afforded Class 3 status under governing case law.

However, the Bank erroneously argues that, along with its interests in its collateral, it is entitled to have the Receivership Estate reserve for fees and costs "incurred by Wells Fargo in enforcing its security interests in this case and on appeal before the Eleventh Circuit in the case captioned *Wells Fargo Bank, N.A. v. Wiand*, Case No. 16-10942[.]" (Doc. 1254). The Bank is conflating the priority of a claim with **the basis of a claim**. While Wells Fargo asserts that reserves should be held for the fees and costs it incurred because attorney's fees and costs are "administrative priority claim[s]," it first must establish that it has a valid basis for the payment of those fees and costs (only after it is determined that, indeed, there is a valid basis is it necessary to determine the priority for their payment). Here, Wells Fargo has no basis for a claim to attorneys' fees and costs relating to the loans secured by the Laurel Mountain or Sarasota Properties because it failed to file any claim relating to those loans.

In *Bendall v. Lancer Management Group*, LLC, 523 Fed. Appx 554 (11th Cir. 2013), the Court held that anyone wishing to recover attorney's fees and legal costs from a receivership estate under a contractual provision that predates the claim bar date must file proof of claims prior to the claims bar date. *Id*. at 558 (in receivership action, affirming district court denial of motions for fees and costs where party failed to file a timely claim). Accordingly, under the law of this Circuit, Wells Fargo has no basis for a claim to attorneys' fees relating to loans secured by the Laurel Mountain and Sarasota Properties because it failed to file a timely claim.

And in any event, at best for Wells Fargo, all it can recover if the Eleventh Circuit determines that it did not have to file a claim to preserve its secured interests in those Properties is the net sale proceeds since, as noted above, the Bank's secured interests in the Properties are only in the amount of the proceeds of the sale of the collateral, and any amount it claims it is owed in excess of those sale proceeds constitute, at best, an unsecured deficiency claim (or Class 3 claim). *See In re J.H. Inv. Services, Inc*., 452 Fed.Appx. 858, 860 (11th Cir. 2011) ("The unsecured portion of an undersecured claim is called a deficiency claim."). Importantly, Wells Fargo is talking out of both sides of its mouth on this issue. In the Eleventh Circuit appeal, the Bank conceded that "**it is not seeking to recover any unsecured deficiency claims against the general pool of receivership assets**." (See p.19 of Appellant's Reply Brief, Case No. 16-10942) (emphasis added). Yet, here it makes no mention of that concession and requests reserves to cover the very fees and costs it told the Eleventh Circuit it is not seeking to recover – fees and costs it cannot recover because it failed to file a claim.

Finally, Wells Fargo's reliance on *S.E.C. v. HKW Trading LLC*, 8:05-CV-1076-T-24-TB, 2009 WL 2499146, at *4 (M.D. Fla. Aug. 14, 2009)[5] is misplaced. In that case, the awarded attorney's fees resulted from a rejected offer of judgment under Florida Statute § 768.79 which was made during the pendency of the receivership and after the party seeking the fees timely filed a contingent claim for attorneys' fees in the receivership's claims process. *Id*. at 3. Here, with respect to the loans secured by the Laurel Mountain and

[5] Wells Fargo attempts to analogize *HKW Trading* to this case by stating the attorneys' fees were incurred in *HKW Trading* "while litigating a lien claim against the receiver[.]" This is false. The underlying litigation in the *HKW Trading* did not involve a lien; rather, it pertained to a timely claim for attorney's fees and costs that the party filed against the receivership estate.

Sarasota Properties, Wells Fargo never filed a claim and consequently failed to preserve its right to recover any attorney's fees under the notes evidencing those loans.

Further, the *HKW Trading* court relied exclusively on *Teague v. Estate of Hopkins*, 709 So.2d 1373 (Fla.1998). In *Teague*, the court found that attorneys' fees awarded against a personal representative pursuant to Florida's offer of judgment statute constituted an expense of administering the probate estate under the Florida Probate Code's provisions addressing the priority of payments for claims against a probate estate because the representative rejected an offer of judgment. *Id*. at 1374-5. ("Because the attorney's fees here would not have been incurred had it not been for the affirmative action of the personal representative and **because the personal representative rejected the offer of judgment**, the fees deserve and are entitled to inclusion in Class 1 costs and expenses of administration.") (emphasis added).

Thus, in *HKW Trading*, the attorneys' fees were awarded as a statutory right that was triggered during the lifespan of the receivership. Here, no offer of judgment was made. Rather, the Bank is seeking fees under contractual provisions executed prior to this Receivership. Moreover, in keeping with the legal principal outlined in *Bendall*, the party seeking attorneys' fees in *HKW Trading* filed a timely claim reserving the rights to fees[6]. Wells Fargo did not do that here. (*See Bendall*, 523 Fed. Appx. at 554). *HKW Trading* is, therefore, easily distinguishable and consistent with *Bendall*.

[6] *See S.E.C. v. HKW Trading, LLC* et al., Case No. 8:05-CV-01076-SCB-TBM (Do. 300, p.2).

Costs Incurred in Related Litigation

Wells Fargo was awarded $40,312.94 in costs associated with related litigation "subject to the approval of the Court in the Receivership Action." (*See Wiand v. Wells Fargo Bank, N.A.*, Case 8:12-cv-00557-JDW-EAJ, Doc. 340). These costs constitute Class 3 claims, and pursuant to the Order Establishing Priority, these claimants may only participate in a distribution of Receivership assets after all allowed amounts for investor claims have been satisfied in full. As noted above, since the interim distribution at issue here will still not fully repay all Class 1 claims, there is no need to reserve for any Class 3 claims. Moreover, although those costs were awarded on January 29, 2016, the Bank has never filed a claim to recover those costs or otherwise asked this Court for their payment or for any reserve relating to those costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 9, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Respectfully submitted,

JAMES HOYER, P.A.

/s/ Sean P. Keefe

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