Securities and Exchange Commission v. Nadel et al Doc. 1351

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.: 8:09-0087-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.
_____/

RECEIVER'S RESPONSE TO WELLS FARGO'S REPLY
IN SUPPORT OF MOTION FOR TURNOVER OF RENTS (DOC. 1332)

Burton W. Wiand, as Receiver (the "**Receiver**") for the above-captioned case, hereby files this response to Wells Fargo Bank, N.A.'s ("**Wells Fargo**") reply in support for turnover of approximately $1,322,923.20 in rents from the Rite-Aid property (the "**Reply**") (Doc. No. 1350) based upon an additional claims of post-receivership interest, attorney's fees and the deficiency from the sale of the Rite-Aid Property. In support of this Response, the Receiver states as follows:

PRELIMINARY STATEMENT

Wells Fargo filed a claim for $2,655,000 on September 2, 2010, in connection with the Rite-Aid Property and has received $2,224,563.15 from the sale of the Rite-Aid Property. Wells Fargo, however, seeks to increase its claim to over $4.1 million. In other words, after subtracting

Dockets.Justia.com

the amount it has already received, Wells Fargo has filed a New Claim for over $1.9 million, which is comprised of principal in the amount of $430,436.85, contract interest of $508,194.17, default interest of $623,260.17, appraisal fee of $6,840.00, and legal fees of approximately $387,145.33.[1] In order to recover a portion of this purported deficiency, Wells Fargo contends it is entitled to $1,322,923.20 in rents from the Rite-Aid property As set forth herein and in the Receiver's Objection, the requested relief should be denied. Not only did Wells Fargo take over five years before it claimed an interest in the Rite-Aid Rents by seeking post-petition interest, but also any entitlement to the Rite-Aid Rents was transferred solely to the Rite-Aid Sale Proceeds[2] under the Rite-Aid Sale Order. Moreover, it is not fair or equitable to allow Wells Fargo to recover $1,131,454.34 of post-receivership interest (as well as fees and costs) on their loan at the expense of defrauded investors. It is also inequitable for Wells Fargo to be given more favorable treatment than other secured creditors who properly claimed their interests. Indeed, even if the Court finds that Wells Fargo has *some* security interest in the Rite Aid Rents, equity cannot permit Wells Fargo to continually add interest—much less *default* interest—to its filed claim of $2,655,000 after the Claims Bar Date. If the Court decides that some interest is warranted, the issues become: (a) what is the applicable interest rate, and (b) for what time period is Wells Fargo entitled to interest. The answers to both issues do not support the amount of interest claimed.

ARGUMENT IN RESPONSE

I. The Balance of Equity Considerations Fall in Favor of Defrauded Investors

It would be entirely inequitable to allow Wells Fargo to collect interest, much less *default* interest—at the expense of the investors defrauded by Nadel's scheme. Wells Fargo, who has

[1] *See* Turnover Motion (Doc. No. 1332, fn 12).
[2] Capitalized terms used herein have the same meaning as ascribed in the *Receiver's Objection to Wells Fargo's Motion Directing Receiver to Turnover Rents from Rite-Aid Property* (Doc. No. 1342).

profited on its loan, already stands to recover a much higher percentage of its claim than other secured creditors. Wells Fargo asks the Court to treat its $2,655,000 claim as certificate of deposit with a 5.6% and 6.7% yield throughout the Receivership Case. Wells Fargo has recovered a total of $2,910,513.37—$255,513.37 more than the Rite-Aid Note and its POC. Therefore, any further distribution to Wells Fargo is tantamount an award of "time-based" damages to the detriment of defrauded investors who are not going to recover their initial investments. Like investors who may not recover false paper profits, interest, or lost opportunity costs on their "investment," it is not fair or equitable to allow Wells Fargo to recover $1,131,454.34 of post-receivership interest on their loan.

Defrauded investors are limited to their out-of-pocket losses; they do not receive interest or compensation for lost opportunities. In balancing the equities in receiverships, one creditor cannot be favored over all others. Wells Fargo directs much ire at the Receiver, but its real motivation is to benefit more than anyone else in the wake of Nadel's fraudulent scheme.

"When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by *federal law*."[3] "The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligation ceases to accrue at the beginning of the proceedings."[4] "It is manifest that the touchstone of each decision on the allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and the debtor."[5] Simply stated—"[i]n equity, remedies to which claimants might be entitled to under other law may be

[3] *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163–64, 67 S. Ct. 237, 240, 91 L. Ed. 162 (1946)(emphasis added).
[4] *In re Residential Capital, LLV*, 508 B.R. 851 (Bankr. S.D.N.Y. 2014) (quoting *Vanston Bondholders* at 163, 67 S.Ct. 237).
[5] *Id.* at 859.

suspended if such a measure is consistent with treating all claimants fairly."[6] In a case similar to the facts present here, *U.S. Commodity Futures Trading Comm'n v. AlphaMetrix, LLC*,[7] the receivership court only allowed the secured creditor's claim up to the principal amount, ignoring the remainder of its claim for interest, fees, and expenses to which it was contractually entitled under its loan agreement.[8] The court found distribution plan was fair and equitable since it provided first for the return to innocent investors and no class of claimants were entitled to post receivership interest.[9]

Assuming, *arguendo*, that the Court finds that Wells Fargo is entitled to post-receivership interest, on equitable principles the court should not award *default* interest, a penalty which would act as a windfall to Wells Fargo and would directly harm the investors and unsecured creditors. The receivership court in *S.E.C. v. Capital Cove* stayed all post-receivership default interest for secured creditors, finding that awarding default interest would defeat the primary purpose of receiverships, which is to "promote orderly and efficient administration of the estate" for the benefit of all creditors.[10] In so reasoning, the court found that "courts have recognized that this consideration of whether junior or unsecured creditors will be harmed 'has special significance.'"[11] Indeed, in bankruptcy, many courts find that default interest rates can be disallowed for equitable reasons.[12] Because the unique goal of equity receivership proceedings

[6] S*.E.C. v. HKW Trading LLC*, No. 8:05-CV-1076-T-24-TB, 2009 WL 2499146 (M.D. Fla. Aug. 14, 2009).
[7] No. 13 C 7896, 2015 WL 13653006, at *3 (N.D. Ill. Sept. 30, 2015).
[8] *Id.* at *4
[9] *Id.* at *3-4.
[10] *S.E.C. v Capital Cove*, No. SAVC 15-980-JLS, 2015 WL 9701154 (C.D. Cal. Oct. 18, 2015)(cites omitted).
[11] *Id.* (quoting *In re Jack Kline Co., Inc.*, 440 B.R. 712, 747 (Bankr. S.D. Tex. 2010)).
[12] *See, e.g.*, *Gen. Elec. Capital Corp. v. Future Media Prods. Inc.*, 547 F.3d 956, 960 (9th Cir. 2008) (noting that a party's default interest is "subject ... to reduction based upon any equities involved."); *Matter of Laymon*, 958 F.2d 72, 75 (5th Cir. 1992) (finding that whether default or contract interest rate applied "must be decided by examining the equities involved in this bankruptcy proceeding"); *In re Gen. Growth Properties, Inc.*, No. 09-11977 ALG, 2011 WL 2974305, at *4 (Bankr. S.D.N.Y. July 20, 2011) (setting forth four-factor test); *In re Jack Kline Co., Inc.*, 440 B.R. 712, 745 (Bankr. S.D. Tex. 2010) (seven factor test).

such as this is to protect investors, the equities favor disallowing Wells Fargo's belated claim for default interest.

II. The Court Has Already Determined that the Priority of Claims, which Excluded Interest for Other Secured Claimants, is Fair and Equitable.

The Court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.[13] In the Claims Order (Doc. No. 689), the Court did not allow other secured creditors to recover post-receivership interest. Wells Fargo should receive the same treatment from this Court that other secured creditors received under the Claims Order. No specific method of distribution is required; the method of distribution should simply be "fair and equitable."[14] Further, courts have consistently found that treating similarly-situated parties alike in claims processes is fair and equitable.[15] In the end, "[a]n equitable plan is not necessarily a plan that everyone will like."[16]

Wells Fargo's Reply emphasizes its objection to the Claims Order (Doc. No. 689) (the "**Wells Fargo Priority Claim Objection**"). The Claims Order made no determination as to Wells Fargo's objection but simply reserved ruling on it. Nevertheless, Wells Fargo did not object to the denial of interest to secured creditors. Rather, the Wells Fargo Priority Claim Objection argued that its filed proof of claim, designated as Claim No. 502 by the Receiver, in the amount of $2,655,000 should be deemed *prima facie* valid.[17] Wells Fargo already is recovering a far greater percentage of its claim than investor creditors. Wells Fargo should receive the same treatment as other secured creditors, which this Court already approved as fair and equitable.

---

[13] *S.E.C. v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992).
[14] *S.E.C. v. P.B. Ventures*, 1991 WL 269982, *2 (E.D. Pa. 1991).
[15] *Id.* at 1570; *United States v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011) (citing *S.E.C. v. Credit Bancorp, Ltd.*, 2000 WL 1752979, at *28 (S.D.N.Y. 2000))
[16] *Credit Bancorp*, 2000 WL 1752979 at *29.
[17] Wells Fargo's Priority Claim Objection (Doc. No. 689, page 3 footnote 3).

The Claims Order and the Claims Bar Date Order do not in any way affect property rights; they are well-recognized means of liquidating claims and determining claim amounts and priorities to bring finality to the receivership estate and facilitate orderly payments to claimants. The Claims Bar Date merely established a drop-dead date for claims so that creditors are barred from constantly changing the amount of their claims—just as Wells Fargo seeks to do here. The Claims Order was implemented precisely "to bring finality to these matters and to allow the Receiver to proceed with distributions . . . absent further order from this Court."[18]

III. Wells Fargo's Objection to Sale Order

Rather than filing a motion for reconsideration or clarification the Rite-Aid Sale Order, Wells Fargo now blames the Receiver for allegedly drafting a standard sale order—an order entered by the Court—that provides "*existing claims*, *liens, and encumbrances . . . arising from a loan . . . shall be transferred to the proceeds of the sale*, and the Property shall become free and clear of any and all such existing claims, liens, and encumbrances." The Bankruptcy Code broadly defines "claim" as the—right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, on matured, disputed, undisputed, legal, equitable, secured, or unsecured.[19]

The Bankruptcy Code's broad definition of claim was used by the Eleventh Circuit in *Bendall v. Lancer Management Group, LLC*,[20] an equity receivership case. But despite the broad definition of claims (which were transferred under the sale order), Wells Fargo again argues again that "a receivership court does not have the authority to extinguish a secured creditor's state law rights or security interests that were vested prior to the Receivership Proceeding."

[18] Claim Order (Doc. No. 776 ¶8).
[19] 11 U.S.C. §101(5).
[20] 523 Fed. App'x. 554 (11th Cir. 2013).

Here, as in bankruptcy proceedings, the order approving the sale expressly provides that all claims and interests against the property sold shall attach to the proceeds of the sale with the same validity, priority, and amount as they existed prior to the sale. This is distinguished from stripping a security interest for failure to file a claim. In the sale context, the creditor receives adequate protection for its interests because its claims attach to the sale proceeds. "A sale of the property of the estate free and clear of liens does not impair, divest, void, cancel or destroy any liens or interests, *but merely transfers liens or the interests attached to particular property to liquidated proceeds*."[21]

IV. Rite-Aid Rents did not Vest with Wells Fargo Pre-Receivership

The Receiver disputes Wells Fargo's claim that the Rite-Aid rents vested pre-receivership with Wells Fargo—that the rents "became the Bank's exclusive property upon default, which occurred prior to the commencement of this receivership."[22]

Under the repayment terms of the Rite-Aid Note, the borrower was required to make monthly interest payments on the 23rd of each month with the principal balance of $2,655,000 (the same amount as the POC) due on May 23, 2009,[23] which was after the Receivership Date—January 21, 2009. Furthermore, Scoop Real Estate LP ("**Scoop RE**") wired the required December interest payment of $9,521.13 on December 24, 2008, thus the next monthly interest payment was not required until January 23, 2009, which again was after the Receivership Date. Consequently, no monetary default could have existed pre-Receivership that would have vested the Rite-Aid Rents to Wells Fargo as claimed. By Wells Fargo's own admission, it was not until

[21] 11 *Norton Bankr.L & Prac.3d,* Fed.R.Bankr.P. 6004, Editors Comment (2013).
[22] *See* Reply pg. 1 ¶ 2.
[23] *See* Modification Number Two to Promissory Note dated September 12, 2008 attached as an Exhibit to Receiver's Objection (Doc. No. 1342-1 pgs. 50-52).

March 17, 2009, that Wells Fargo "notified the Receiver that Scoop was in default of the Note."[24] Equally problematic, Wells Fargo now claims that a default occurred pre-receivership, when Wells Fargo previously argued that a default occurred when Scoop RE consented to the Receivership.[25]

The Rite-Aid loan documents, however, permit the use of the Rite-Aid rents in any that it wished as long as the Rite-Aid loan is not in default. Wells Fargo may not treat the mere initiation of the Receivership as a default. This same argument was advanced by a secured creditor and rejected by the receivership court in *S.E.C. v. Byers*,[26] where the secured creditor sought to enforce an assignment of rents based on the purported default caused by the mere filing of the receivership.[27] The court found that the receivership injunction and stay order "absolutely" prevented the creditor from declaring a default, and the purpose of the injunction was "to preserve the value of the entire estate to maximize recovery for all creditors and investors. Without it, the estate's secured creditors would all immediately foreclose, wasting the estate's value."[28] Similarly, the Injunction Order and Order Appointing Receiver the prevent the declaration of a default just by virtue of the Receivership.[29]

Additionally, the provisions in Wells Fargo's loan documents which impose a default upon the appointment of a receiver are akin to *ipso facto* clauses, largely disfavored in bankruptcy proceedings. "*Ipso facto* clauses are contractual provisions which expressly state that upon a borrower's filing of a bankruptcy petition, the creditor may accelerate the payment of the entire

[24] *See Turnover Motion* (Doc. No. 1332 pg. 6 ¶ 1).
[25] *See Turnover Motion* (Doc. No. 1332 at 15).
[26] 671 F. Supp.2d 531 (S.D.N.Y. 2009).
[27] *Id.* at 540–41.
[28] *Id.* at 540.
[29] *Order of Preliminary Injunction and Other Relief as to Defendants Scoop Capital, LLC and Scoop Management, Inc. and all Relief Defendants* (the "**Injunction Order**") (Doc. No. 7).

unpaid balance due under the terms of the contract."[30] To the extent the mere filing of the Receivership Case *can* constitute a default, the *ipso facto* provision should be deemed void as a violation of public policy of receivership cases, which should allow a receiver to use receivership estate property in the best manner to maximize recovery for defrauded investors.

Wells Fargo reliance on *Title Max v. Northington* (*In re Wilbur*) is misplaced for a number of reasons.[31] In *Title Max*, the debtor's default on the auto loan occurred before the petition date. At issue in that case was a specific state law pawnbroker statute that, by operation of the statute, extinguishes the ownership interest of the pledgor in the pledged automobile if it does not pay the redemption amount within a certain time period.[32] The court went to great lengths to limit its holding to the facts of the case,[33] and the precise mechanics of the statute at issue determined the result of the case. The operation of the statute at issue in *Title Max* is distinct from the operation of the loan documents claimed by Wells Fargo.

Under Wells Fargo's construction of its loan documents, Scoop held a "license" to collect, use, and receive the Rents. (Assignment of Rents and Leases § 7(a)). As discussed above, no default occurred prior to the Receivership Date, and the Receivership Order did not *ipso facto* create a default. Thus, the "license" to collect, use, and receive the Rents was itself property of the Receivership Estate as of the Receivership Date. Wells Fargo asserts that upon default, this

---

[30] *In re W.R. Grace & Co.*, 475 B.R. 34, 152 (D. Del. 2012). *Matter of Rose*, 21 B.R. 272, 276 (Bankr. D.N.J. 1982) (finding *ipso facto* clauses unenforceable); *In re Price Oil, Inc.*, 2006 WL 3313781, at *3 (Bankr. M.D. Ala. Nov. 14 2006) (finding "[i]t is axiomatic that the bankruptcy laws disfavor ipso facto clauses which purport to entitle a creditor to call due an indebtedness solely on account of a bankruptcy filing." (quoting *Dossett v. First Union Nat'l Bank (In re Dossett)*, 1991 WL 11002466 (Bankr. S.D. Ga. 1991)).

[31] *Title Max v. Wilbur* (*In re Northington)*, 876 F.3d 1302 (11th Cir 2017).

[32] *See id.* at 1311 (discussing Ga. Code Ann. § 44-14-403(b)(3)).

[33] *See, e.g.*, *id.* at 1307 ("In the particular circumstances of this case"); *id.* at 1308 ("on the unique facts of this case"); *id.* ("in the circumstances presented here"); *id.* at 1309 ("in the particular (and peculiar) factual and procedural posture in which this case arises").

license was "automatically revoked without any action required by [Wells Fargo]." (Assignment of Rents and Leases § 7(a)).

Revocation of a license granted by a contract, whether "automatic" or not, is distinguishable from the extinguishment of a property interest by operation of state statute at issue in *Title Max*. The Receivership Order specifically enjoined creditors and banks from "in any way disturbing the assets or proceeds of the receivership." (Receivership Order ¶ 15.) Revocation of a license to collect rents, pursuant to a contract with Wells Fargo, surely "disturbs" the license, which was an asset of the Receivership Estate, in violation of the Receivership Order's injunction. Further, the Injunction Order (Doc. No. 7), expressly prohibited and restrained "banks" from "directly or indirectly . . . transferring, setting off, receiving, [or] changing . . . any assets or property, including but not limited to . . . property pledged or hypothecated as collateral for loans." (Doc. No. 7 ¶ II.A).[34] *Title Max* is fact-specific and does not apply to revocation of a license in contravention of the terms of an injunction. The case should not weigh on any issue before the Court.

CONCLUSION

Wells Fargo's demand for turnover of the Rite-Aid Rents is nothing more than an attempt to inequitably advance its claim to the detriment of defrauded investors and in preference to other secured creditors— as such it should be denied. For all of the reasons stated in the Objection, as supplemented by this Response, the Court should deny Wells Fargo's request to turnover the Rite-Aid Rents.

[34] Indeed, in Wells Fargo's motion for relief from the Receivership Order's injunction (Doc. No. 718) filed on January 19, 2012, treats the Rents as collateral—in possession of the Receiver—and makes no mention of any supposed "revocation" of a license. In fact, by asking the Court for permission to foreclose on its "Collateral" (a definitional term used in that motion which included the Rents, *see* Doc. No. 718 ¶¶ 6–7), Wells Fargo implicitly acknowledges that possession of the Rents had not transferred by revocation of the license, which was stayed by the Receivership Order. Wells Fargo's motion for relief from the injunction was denied as moot due to the entry of the Sale Order.

DATED: January 26, 2018

/s/ Susan Heath Sharp
Susan Heath Sharp (FBN 716421)
Matthew B. Hale (FBN 110600)
Stichter Riedel Blain & Postler, P.A.
110 E. Madison St., Ste. 200
Tampa, FL 33602
Telephone: 813-229-0144
Facsimile: 813-229-1811
Email: ssharp@srbp.com
mhale@srbp.com

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/Susan Heath Sharp
Attorney