

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

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, LTD,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT,

Relief Defendants.

**RECEIVER'S REPLY TO TRSTE, INC.'S AND WELLS FARGO BANK, N.A.'S
OBJECTION AND OPPOSITION TO RECEIVER'S MOTION
TO APPROVE DETERMINATION AND PRIORITY OF CLAIMS (DOC. 690)**

Burton W. Wiand, as Receiver (the “**Receiver**”), filed a motion relating to claims determinations and the claims process (the “**Motion**”) (Doc. 675). TRSTE, Inc. (“**TRSTE**”) and Wells Fargo Bank, N.A., as successor to Wachovia Bank, N.A. (collectively, “**Wachovia**”), filed an objection and opposition (the “**Objection**”) to the Motion (Doc. 690). The Objection relates to a loan made by Wachovia to Receivership Entity Laurel Preserve, LLC, and secured by land in North Carolina commonly referred to in this Receivership as the “**Laurel Mountain Property.**” Wachovia has not filed a claim with respect to the loan and security interest underlying this matter, and thus the Court should dispose of both this Objection and Wachovia’s interest in the Laurel Mountain Property at this time.

As shown below, Wachovia received timely notice that the Laurel Mountain Property is part of this Receivership and of the claims process, yet it inexplicably never filed a pertinent claim. Rather than explaining why it did not file a claim, the Objection resorts to fabricating several arguments for why Wachovia’s interests should not be adversely affected. Wachovia argues that: (1) the Court and the Receiver lack jurisdiction over the Laurel Mountain Property; (2) it did not receive notice before the Laurel Mountain Property was included in this Receivership; and (3) TRSTE was not provided any notice at all. As shown below, these arguments have no merit.

I. THE RECEIVER COMPLIED WITH 28 U.S.C. § 754, SO THE COURT HAS COMPLETE JURISDICTION AND CONTROL

Wachovia’s first argument is that neither the Receiver nor the Court has jurisdiction and control over the Laurel Mountain Property because the Receiver purportedly failed to comply with 28 U.S.C. § 754. Wachovia is wrong. Section 754 authorizes federal district courts, through a receiver “in any civil proceeding involving property ... situated in different

districts,” to assert “complete jurisdiction and control of all such property with the right to take possession thereof.” 28 U.S.C. § 754; *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Col. 1995) (when court orders entity into receivership, “all assets of the company [are] placed in the custody of the [c]ourt,” and it obtains “exclusive jurisdiction with respect to the administration, possession and control of [the entity’s] assets”). To obtain such “jurisdiction and control,” a receiver must “within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located.” 28 U.S.C. § 754.

Wachovia claims the Receiver failed to file the documents required by Section 754 in the U.S. District Court for the Western District of North Carolina, where the Laurel Mountain Property is located (Obj. at 5), but it is wrong. The Court entered an Order Reappointing Receiver (Doc. 140) on June 3, 2009, and seven days later, on June 10, 2009, the Receiver filed certified copies of that Order and the Complaint in this case (Doc. 1) in the pertinent court. *See* Decl. of G. Morello (“**Morello Decl.**”) ¶ 4 & Comp. Ex. 1, filed along with this reply. That filing complied with Section 754 and gave the Court and the Receiver complete jurisdiction and control over the Laurel Mountain Property.

II. FORFEITURE MATTERS IN NADEL’S CRIMINAL CASE DO NOT AFFECT THIS COURT’S JURISDICTION AND CONTROL

Wachovia’s also argues that the Laurel Mountain Property is under the jurisdiction of the U.S. District Court for the Southern District of New York and in the custody and control of the U.S. Marshals Service. Obj. at 6-7. Wachovia premises this contention on entry of an Order of Forfeiture in the criminal case against Nadel on October 21, 2010 (the “**Forfeiture Order**”) and asserts “the Receiver did not take any action to ensure he ... obtained and

maintained jurisdiction” of the Laurel Mountain Property. This too is wrong.

First, the argument is wrong because, as discussed above in Section I, the Court and Receiver obtained jurisdiction and control over the Laurel Mountain Property on June 10, 2009 – more than four months before entry of the Forfeiture Order. As such, contrary to Wachovia’s contention, the Court and Receiver already had jurisdiction and control of the property when the Forfeiture Order was entered, and that order did not displace or otherwise affect that control and jurisdiction. *See Eller Indus.*, 929 F. Supp. at 371-72 (“Federal Courts have the power, if necessary, to take control over an entity and impose a receivership free from interference in other court proceedings.”); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60, 61 (2d Cir. 1934) (“Receivership court has jurisdiction to decide all questions of preservation, collection, and distribution of assets.”); *SEC v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980) (“The power of a receivership court to prevent the commencement, prosecution, continuation, or enforcement of such [competing] actions has been recognized specifically in the context of securities fraud cases.”); *Becker v. Greene*, 2009 WL 2948463, *4 (M.D. La. 2009) (“The Receiver and the Receivership Court’s power to protect and marshal assets would be severely diminished if every court in the nation, state or federal, could make its own determination of what constitutes an asset of the ‘Receivership Estate.’”); *SEC v. Credit Bancorp, Ltd.*, 93 F. Supp. 2d 475, 476-77 (S.D.N.Y. 2000) (“[W]here a court has appointed a receiver and obtained jurisdiction over the receivership estate, as here, the power to stay competing actions falls within the court’s inherent power to prevent interference with the administration of that estate.”).

Second, the argument is wrong because it conflates “jurisdiction” and “title.”

Forfeiture addresses title, rights, and interests in property. *See, e.g., U.S. v. A Group of Islands known as Cayos De Banca*, 185 F. Supp. 2d 117, 120-21 (D.P.R. 2001) (discussing effect of forfeiture). It does not affect a receivership court's jurisdiction over such property. *See, e.g., Quincy, Mo. & Pacific R. Co. v. Humphreys*, 145 U.S. 82, 97 (1892) (noting effect of receiver's appointment "is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title"); *Powell v. Md.*, 125 F.2d 260, 271 (4th Cir. 1942) (same); *Penn. Steel Co. v. N.Y. City Ry. Co.*, 198 F. 721, 728 (2d Cir. 1912) ("Being a mere holder [of property for the court, a receiver's] appointment does not change the title to the property in his charge...."). Thus, even assuming the Laurel Mountain Property was forfeited, the Court's jurisdiction and control over it was not affected. Rather, if forfeited and the government wanted to take control of it, representatives of the United States would have sought relief in this Court.

But the government has not done so because of an understanding between it and the Receiver. And for this reason as well, Wachovia's argument has no merit. Specifically, neither the U.S. Marshals Service nor any other government representative has taken any action with respect to the Laurel Mountain Property in the nearly 15 months since entry of the Forfeiture Order. Morello Decl. ¶¶ 6, 7. This is a result of an understanding between the Receiver and representatives of the U.S. Attorney's Office which prosecuted Nadel that assets controlled by Nadel, including the Laurel Mountain Property, will be liquidated through the Receivership and used to compensate victims through the claims process in this case. *Id.* The Objection's representation that the Laurel Mountain Property is in the "custody and control of the United States Marshals Service" and that the Court and Receiver

lack jurisdiction over it are simply false.

III. THE RECEIVER SATISFIED ALL NOTICE REQUIREMENTS IN COMPLIANCE WITH DUE PROCESS

Wachovia's final argument is that neither it nor TRSTE received notice in compliance with Fifth Amendment Due Process requirements. This too is wrong. As an initial matter, it is important to emphasize that Wachovia never asserts that it did not receive timely notice of the claims process and its need to file a claim to preserve its interests – it cannot do so because, as discussed in Section IV below, it received notice and filed a timely claim relating to a different loan secured by a different receivership property. Instead, it argues that its due process rights were violated because of the Receiver's purported "failure to afford TRSTE or [Wachovia] ... notice of his intention to appropriate Laurel Mountain before he exercised dominion over the property." Obj. at 7. As a result, it argues, "TRSTE and [Wachovia] ... were deprived of the opportunity to present a claim and submit evidence of the facts or to make arguments before the Court" *Id.* at 9. This argument fails for several reasons.

First, this argument fails because Wachovia was not entitled to notice of the Laurel Mountain Property's inclusion in this Receivership because its inclusion did not deprive Wachovia of its interest in the property.¹ "Generally, if government action will deprive an

¹ The declaration of a North Carolina real property law attorney filed by Wachovia in support of its Objection, which concluded that the Receiver should have given written notice "of the receivership proceeding" to TRSTE for "this receivership proceeding to have unquestionable jurisdiction and control over" the Laurel Mountain Property, also lacks merit for several reasons. Obj., Ex. F (Doc. 690-6). First, it is based on "customs and practices" (*see* ¶¶ 10, 18), and it neither cites applicable authority nor addresses the plain language of Section 754. Second, it purports to rely on an analogous circumstance – foreclosure of a mechanic's lien – but fails to explain how such a foreclosure is analogous to the circumstances here where the property's title or Wachovia's interests have not yet been impacted. Third, it fails to address the fact discussed below that TRSTE is merely a "straw" for Wachovia. Fourth, it fails to address that although the Receiver did not record a Notice of Lis Pendens – which is not required by applicable law – he did record in the pertinent counties several documents giving notice of this Receivership and its ties to Laurel Preserve, LLC, and the Laurel Mountain Property. *See* Morello Decl. ¶¶ 8-14, Exs. 2, 3.

individual of a significant property interest, that individual is entitled to an opportunity to be heard.” *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). Wachovia is a secured creditor, and it does not – and cannot – explain how inclusion of the Laurel Mountain Property in the Receivership “deprived” or otherwise affected its security interest in the Property.² See *Quincy, Mo. & Pacific R. Co.*, 145 U.S. at 97; *Powell*, 125 F.2d at 271; *Penn. Steel Co.*, 198 F. at 728; see also *Elliott*, 953 F.2d at 1576-78 (considering rights of secured creditors with respect to receivership distribution plan); *SEC v. Byers*, 637 F. Supp. 2d 166, 183 (S.D.N.Y. 2009) (adopting distribution plan which “permit[ted] secured creditors to recover out of their collateral”); *United States v. Petters*, 2011 WL 281031, *3 (D. Minn. 2011) (establishing separate group of creditors, including banks holding secured loans, each of which received specific assets assigned to it). Rather, inclusion in the Receivership simply shifted control of the property from Nadel to the Court and the Receiver. It is the claims process that addresses creditors’ interests and triggers due process protections, and due process simply requires that the claims process be fair and that affected parties be given notice and an opportunity to be heard. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Elliott*, 953 F.2d at 1566. As discussed in Section IV below, Wachovia received timely notice of the claims process but inexplicably failed to file a claim and preserve its interest in the Laurel Mountain Property.

Second, Wachovia’s argument fails because contrary to its suggestion, it has had

² Wachovia relies solely on *SEC v. Whitworth Energy Res. Ltd.*, 2000 WL 1770652 (9th Cir. 2000), but that case involved owners of property seized by a receivership, and not mere creditors with a security interest as is the case here. And in any event, in relevant part the due process concerns in that case related to the proposed sale of receivership assets – actions that undoubtedly affect property rights. Wachovia has cited no authority showing a secured creditor is entitled to notice before a property securing its debt is placed into receivership.

specific notice of the Laurel Mountain Property's association with this Receivership since very early on, and it never complained of inadequate notice or asked the Receiver to provide separate notice to TRSTE. This Receivership commenced on January 21, 2009, and Wachovia acknowledges receipt of February 6, 2009, correspondence from the Receiver's counsel informing it of this Receivership (*see* Doc. 690-2). However, it complains that letter did not identify the Laurel Mountain Property or provide any specifics. But Wachovia ignores other communications between the Receiver and his representatives and both Wachovia and its outside counsel beginning shortly after inception of this Receivership. *See* Morello Decl. ¶¶ 15-19. Indeed, on March 17, 2009 – less than two months after the Receivership's inception – Jeffrey T. Kucera, Esq. of K&L Gates wrote to the Receiver to explain that he represented Wachovia specifically in connection with the loan secured by the Laurel Mountain Property. *Id.* Ex. 6. Subsequently, the Receiver's representatives and Mr. Kucera had other communications specifically relating to the Laurel Mountain Property. *Id.* Comp. Ex. 7. And before that, beginning in the first several weeks of this Receivership, the Receiver's representatives had numerous communications with Wachovia representatives relating to this Receivership. *Id.* ¶ 15. Even a February 9, 2009, subpoena which Wachovia accepted specifically mentioned Laurel Preserve, LLC. *See di.* ¶ 16, Ex. 4. In short, although the Objection suggests a lack of knowledge by Wachovia of the Laurel Mountain Property's association with this Receivership, that is simply untrue.

Wachovia's argument that no notice was provided to TRSTE also fails because it is a classic "red herring." TRSTE is merely a "straw" entity controlled by Wachovia (TRSTE's "Principal Officers" as identified in a North Carolina corporate filing are an officer of and an

in-house counsel and paralegal for Wachovia) and used to hold deeds in trust pending satisfaction of mortgages in certain states, including North Carolina. *Id.* ¶¶ 12, 22, Ex. 9. As even the Deed of Trust for the pertinent loan demonstrates, the real party-in-interest is Wachovia: Wachovia, and not TRSTE, has all substantive rights under that document, including with respect to receipt of proceeds of any foreclosure sale. *See generally* Doc. 690-1, Ex. 1. Indeed, notice under that document only needs to be provided to Wachovia – there is no obligation to provide any notice to TRSTE. *See id.* at 13.

Finally, and most telling, Wachovia's own actions show its arguments have no merit. Specifically, Wachovia made several loans, including one to Receivership Entity Scoop Real Estate, L.P. which was secured by another real property in North Carolina and for which Wachovia filed a claim as part of the claims process in this case. Morello Decl. ¶¶ 24, 25. For that loan, the deed was also held by TRSTE, but the claim was only filed by Wachovia, not TRSTE. *Id.* Exs. 11, 12. This further demonstrates two important points made above: (1) that Wachovia received timely notice of the claims process and knew of its need to file a claim to preserve its rights; and (2) that the real party-in-interest is Wachovia, and any lack of notice to TRSTE is inconsequential as TRSTE has no claim.

IV. THE COURT SHOULD FIND THAT WACHOVIA'S INTEREST IN THE LAUREL MOUNTAIN PROPERTY IS EXTINGUISHED

As previously noted, the Receiver notified Wachovia of the claims process in compliance with due process. Specifically, on June 4, 2010, the Receiver mailed a claims packet to Wachovia which included a cover letter, a Notice of Deadline Requiring Filing Of Proofs Of Claim On Or Before September 2, 2010, and a Proof Of Claim form as approved by the Court. *Id.* ¶ 23, Ex. 10. Those papers described the receivership and claims process,

the ramifications of a failure to file a claim, and the claims bar date (or deadline for filing a claim).³ Further, the Receiver provided notice by global publication on one day in *The Wall Street Journal* and publication on one day in the *Sarasota-Herald Tribune* and by publication on the Receiver's website (www.nadelreceivership.com). *Id.* ¶ 28; *see generally* Doc. 390 (motion seeking approval of notice and procedures for filing claims). Wachovia does not contend it did not receive notice, and its filing of a claim relating to another loan on the pre-printed claim form mailed by the Receiver establishes that it did. *Id.* ¶ 24. Pursuant to the Court's Order on the Receiver's motion relating to notice and submission of claims (Doc. 391), any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before September 2, 2010, is barred and precluded from asserting any claim to Receivership assets. Because Wachovia did not file a claim relating to its loan on the Laurel Mountain Property, it can no longer pursue its interest in that property. *See Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *SEC v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) ("All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined."); *CFTC v. Wall St. Underground, Inc.*, 2007 WL 1531856, *4 (D. Kan. 2007) (same); Ralph E. Clark, *Clark on Receivers* § 646, at 1132 (3rd ed. 1992) ("Every person who has any claim or

³ Because Wachovia was also invested in two of the hedge funds underlying this case, the Receiver sent claims packets relating to each of those investments to the attention of the Managing Counsel at the Wells Fargo Law Dept. *See* Morello Decl. ¶ 27, Comp. Ex. 13.

demand against the estate or property in the custody of the court through the receiver, . . . must assert such claim or demand in the court on which such receiver was appointed.”). Indeed, as these cases show, because Wachovia did not file a claim, it does not even have standing to assert its Objection.

Notably, Receiver’s counsel specifically informed Wachovia’s counsel of the ramifications of its failure to file a claim. After the September 2, 2010, claims deadline, Wachovia’s counsel wrote to the Receiver about the Laurel Mountain Property, and on April 5, 2011, the Receiver’s counsel responded and explained the ramifications of Wachovia’s failure to file a claim. Morello Decl. ¶ 20, Ex. 8. Receiver’s counsel also noted that if Wachovia “believes there are circumstances that justify its failure to file a Proof of Claim, it remains free to submit one and an explanation for the delay and any other materials or information which it deems appropriate.” *Id.* Wachovia still never filed a claim.

In short, Wachovia had ample notice and opportunities to file a claim, and that it failed to do so does not mean that it was deprived of due process. *See Elliott*, 953 F.2d 1560, 1566 (“Due process requires notice and an opportunity to be heard.”). As a result of this failure, Wachovia is now forever barred from pursuing its interest in the Laurel Mountain Property, and the Court should enter an order terminating that interest so this matter is fully resolved and the Receiver can sell the property free and clear of Wachovia’s encumbrance. *See, e.g., Miners’ Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (3d Cir. 1933); *People’s-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972, 973 (3d Cir. 1933); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931).

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on January 17, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I **FURTHER CERTIFY** that on January 18, 2012, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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