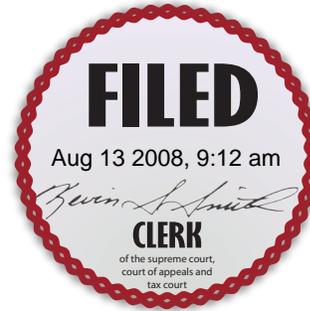


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ARBOR HOMES, LLC,)
)
Appellant-Plaintiff,)
)
vs.) No. 32A01-0803-CV-121
)
BEACON POINTE, LLC,)
)
Appellee-Defendant.)

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0702-PL-4

August 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Arbor Homes, LLC (“Arbor”) appeals the trial court’s authorization of Beacon Pointe, LLC’s (“Beacon”) sale of property to GMD Brown, LLC (“GMD”). We affirm.

Issues

Arbor raises multiple issues, and Beacon urges us to dismiss the appeal as moot.

We consolidate and restate the issues as:

- I. whether the appeal is moot because the sale of the property is complete; and
- II. whether the trial court abused its discretion in approving the sale to GMD.

Facts

In May of 2004, Beacon purchased seventy-five acres of land in Hendricks County with a mortgage through Fifth Third Bank (“Fifth Third”). Equicor Development, Inc. originally proposed a subdivision for the area in July of 2000. Equicor Development created Equicor Realty, LLC to purchase the land and then created Beacon to hold the land and execute the necessary financing. Dann Small, Greg Small, and Mark Zuckerman have ownership and control over all the Equicor entities, which are organized as individual corporations and limited liability companies.¹

¹ The Equicor entities include, among others: GMD Brown, LLC; Equicor Brokerage, LLC; Equicor Companies, Inc.; Equicor Companies, LLC; Equicor Construction, LLC; Equicor Development at FK, LLC; Equicor Development at WP, LLC; Equicor Development, Inc.; Equicor Development, LLC; Equicor Financial, Inc.; Equicor Real Estate Management Services, LLC; Equicor Realty, Inc.; Equicor Realty, LLC; Equicor Residential, LLC; Woodall Investments; Beacon Pointe Development Associates, LLC; MEZQRES, Inc.; and Mark Zuckerman and Associates, Inc..

Beacon and Arbor entered an agreement on May 27, 2004, for the development and sale of the land. Beacon was to develop the land into subdivision lots and sell them to Arbor, which would handle the home construction. The project was to be completed in two phases. The Lot Purchase Agreement provided for Arbor to make a \$300,000 deposit to Beacon, which would then be applied to Arbor's eventual purchase of the lots. The parties also executed a promissory note providing that Arbor loan Beacon \$350,000.² The same day, Beacon, Arbor, and Fifth Third entered into a "Subordination and Stand-by Agreement" providing that any interests of Arbor's would be subordinated to those of Fifth Third. App. p. 90. Specifically, the agreement stated that "[Beacon] and [Arbor] hereby represent to [Fifth Third] that the indebtedness from [Beacon] to [Arbor] is unsecured . . ." *Id.* (emphasis added).³ Phase one of the development was completed according to the Lot Purchase Agreement.

On January 24, 2007, Beacon informed Arbor that it would be unable to undertake the development of the land for phase two of the project. Arbor filed a complaint on February 1, 2007, for breach of contract and breach of promissory note. On April 30, 2007, Beacon filed a motion for stay and motion for an order to allow sale of the real estate. The trial court denied both motions. On July 30, 2007, the parties agreed to the appointment of a receiver. The trial court appointed Abigail Hohmann of Colliers Turley

² The promissory note listed the loan amount as \$350,000. Arbor and Beacon, however, in their briefs explicitly state that Arbor loaned Beacon \$187,967. We are not sure whether Arbor did not loan the full amount available, if some repayment under phase one has already been made, or what causes this discrepancy. The parties do not include evidence of the amount actually loaned.

³ Beacon also wrote a letter to Arbor on May 27, 2004, stating that the promissory note would be secured by a second mortgage on the property, but apparently that mortgage was not accomplished.

Martin Tucker to market and sell the land that was intended for phase two of the project. Hohmann listed the property for sale at \$989,000. The order appointing the receiver specified when the trial court approved an offer for the sale, the land would be sold “free and clear of any liens or claims of Arbor Homes.” Id. at 112.

The Smalls and Zuckerman formed GMD on December 14, 2007. On December 20, 2007, Beacon modified its original loan agreement with Fifth Third. The original agreement provided for a development loan of \$2,932,000 and a land acquisition loan of \$730,000. The principal amount of the development loan was reduced from \$1,010,059.86 to \$910,059.86 and the maturity date was extended to March 5, 2008.

On January 9, 2008, Beacon requested that the trial court issue an order directing the sale of the property to GMD for \$900,000. Beacon noted in their motion that the receiver recommended the sales contract be approved. Arbor objected to the sale and requested a hearing, arguing that because GMD was affiliated with Beacon it could not be a fair and appropriate sale as contemplated by the receivership statute. Greg Small, a principal of Equicor, signed the sales contract as both the buyer and seller, as a member of GMD and a manager of Beacon.

The trial court held a hearing on February 7, 2008.⁴ It found Hohmann’s recommendation to approve the sale reasonable, though the record does not indicate if she appeared to testify or submitted a written recommendation. The trial court granted the parties 120 days to complete discovery. On March 7, 2008, after some discovery but

⁴ The transcript of this hearing is not included in the record on appeal. We glean any information about what occurred from the detailed chronological case summary entry.

before the passing of 120 days, the trial court held another hearing. Attorneys for Arbor argued that the proposed sale to GMD was a “sham transaction.” Tr. p. 7. Attorneys for Beacon countered that Arbor had not presented any evidence that the sales price of \$900,000 was inappropriate for the land. The trial court found that the offer was fair and appropriate, approved the offer, and ordered the sale of the property “free and clear of any liens or claims of Arbor Homes.” App. p. 6. Arbor filed its notice of interlocutory appeal on March 11, 2008. The property was transferred to GMD on May 7, 2008, pursuant to the terms of the approved sale.

Analysis

I. Dismissal of the Appeal

Beacon argues that since the sale of the land has been completed and ownership of the property has been transferred to GMD, any issues on appeal are moot. Beacon contends that the issues on appeal no longer constitute an actual controversy, that this court is unable to render any effective relief, and that the appeal should be dismissed pursuant to Goodson v. Bd. of Trustees of Young Men’s Christian Ass’n of Vincennes, 145 Ind. App. 561, 251 N.E.2d 858 (1969). Arbor responds that Goodson is not analogous to this situation and that relief from this court is not impossible. We agree. In Goodson, the appellant-plaintiff was a remonstrating member of the public and the defendant had already sold the property at issue to a third party. Unlike the Goodson case, Arbor still has some interest in the transaction and is not merely a remonstrating member of the general public. GMD is not a totally removed third party, but is related to Beacon. Nor is the appeal moot just because the sale is complete and ownership of the

property has changed hands. See, e.g., Dempsey v. Auditor of Marion County, 871 N.E.2d 1031, 1038 (Ind. Ct. App. 2007) (reversing the issuance of a tax deed and invalidating the sale of a parcel of land after the sale was completed), trans. denied. We conclude that the issues in this appeal are not moot and proceed to address them.

II. Approval of the Sale

Arbor argues that the trial court abused its discretion in approving the sale of the land to GBD for two primary reasons. First, Arbor contends that the sale was not really a “sale” of property, but merely a transfer between two related entities that failed to satisfy the receivership statute. Arbor also argues that the transfer subordinated its security interest.

The appointment of a receiver is intended to help the trial court “accomplish, as far as practicable, complete justice between the parties before it.” Bitting v. Ten Eyck, 85 Ind. 357, 360 (1882). The Indiana Code authorizes the appointment of a receiver “in an action between partners or persons jointly interested in any property or fund” and in other cases as it “may be necessary to secure ample justice to the parties.” Ind. Code § 32-30-5-1(2) & (7). The trial court’s appointment of a receiver is subject to review under an abuse of discretion standard. See McKinley v. Long, 227 Ind. 639, 641, 88 N.E.2d 382, 383 (1949); Cooper v. Morris, 210 Ind. 162, 173, 200 N.E. 222, 227 (1936). The record indicated both parties agreed to the appointment of a receiver, and Arbor does not

challenge the appointment of Hohmann. The problem here arose after the sale of the property did not generate enough money to pay both Fifth Third and Arbor.⁵

Once appointed, a receiver may not subordinate one creditor's interest to that of another creditor. KeyBank Nat'l Ass'n v. Michael, 737 N.E.2d 834, 850 (Ind. Ct. App. 2000), trans. denied. Arbor's reliance on KeyBank for the proposition that its interest⁶ was improperly subordinated is misplaced. In that case, a new lender granted a loan to the defaulted corporation in order for the corporation to resume its operation. The receiver explicitly granted a security interest to the new lender and subordinated Keybank's secured interests in favor of that lender without Keybank's consent. Nothing in the Keybank decision, however, prevents the sale of land and release of an entity's interest in it. Arbor agreed to the trial court's order appointing the receiver, which expressly stated that the "real estate shall be sold, free and clear of any liens or claims of Arbor Homes." App. p. 112.

Arbor's argument also ignores the subordination agreement between Beacon, Arbor, and Fifth Third. That agreement, signed by all the parties, set out that Arbor's interests would be secondary to Fifth Third's. The promissory note executed between Beacon and Arbor also explicitly states that "the indebtedness evidenced by this instrument is subordinated to the prior payment in full of all indebtedness of Borrower

⁵ The parties do not include details of the distribution of the receiver's sale proceeds. Presumably after deducting any fees paid to Hohmann the remainder of the \$900,000 purchase price was used to satisfy the \$910,000 mortgage due to Fifth Third.

⁶ Arbor insists it has a secured interest in the property and Beacon contends the any interest of Arbor's is unsecured. The nature of this interest does not affect our decision here.

[Beacon] to Fifth Third Bank . . .” App. p. 65. The receiver did not subordinate Arbor’s interest; Arbor agreed to subordinate its own interest long before the receiver became involved. A receivership sale does not change the creditor’s priorities. “[T]he relative rank of claims and the standing of liens remains unaffected by a receivership.” Keybank, 737 N.E.2d at 850 (quoting American Trust & Sav. Bank v. McGettigan, 152 Ind. 582, 52 N.E. 793 (1899)). Regardless of the outcome of the sale, Arbor would not have had first priority and the receiver had no power to give Arbor first priority.

Indiana Code Section 32-30-5-7 authorizes a receiver to sell property under control of the court. Nothing in the receivership statutes expressly prohibits a sale of property to an entity with ties to the original owner. Arbor argues that because Beacon and GMD are merely corporate offshoots of the same organization that any purported sale of land between them is actually only a transfer and does not fulfill the requirements of a receiver’s sale. Arbor urges us to “pierce the veil between sister companies” and consider Beacon and GMD not distinct entities. Appellant’s Br. p. 18. Arbor points out and we acknowledge that it appears GMD was created exclusively for the purpose of entering into a transaction involving the property.

We do not find a basis on which to reverse the trial court’s approval of the sale. The trial court held two hearings prior to ordering the sale and allowed discovery between Arbor and Beacon. The evidence does not indicate that any other offers on the property had been garnered, and the offer presented was at the appraised property value. The receiver was a professional commercial real estate broker and recommended the sale. The appointment of a receiver is intended to help the trial court accomplish complete

justice between the parties “as far as practicable.” Bitting, 85 Ind. at 357. This result, though not perfect, seemed to be a practical solution. The trial court did not abuse its discretion in approving and ordering the sale. Finally, although Arbor did not receive benefits from the receiver’s sale of the property, the sale did not terminate its breach of contract and breach of promissory note actions against Beacon.⁷

Conclusion

The issues on appeal are not moot. The trial court did not abuse its discretion in the appointment of the receiver and the approval of the sale of the property. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.

⁷ Beacon suggested during the final trial court hearing that Arbor’s proper remedy would be to initiate a separate action against GMD and pierce its corporate veil in an attempt to satisfy the debts of Beacon.