

The Receiver undertook efforts to market the Subject Property for sale. Initially, the Receiver gathered historical documentation (licenses, agreements, approvals, plans, title reports, consultants' reports). As part of these efforts, the Estate coordinated to retrieve historical

documentation regarding the prior approvals for the condominium development. Thereafter, the Receiver engaged in discussions with previously interested parties to determine whether any of those parties would be interested and capable of making a stalking horse offer, subject to competitive bidding to acquire the Subject Property. None of those parties provided the Receiver with adequate proof of funds to allow the Receiver to move forward with presenting a stalking horse bid. The Receiver then sought to market the Subject Property to acquire the highest and best bid to purchase the Subject Property. The Receiver populated an electronic data room to allow interested parties to view certain diligence materials and permit those parties to put forth their best offer to acquire the Subject Property. The Receiver provided bidders with a form of confidentiality agreement to access the electronic data room.

To further advertise the potential sale, the Receiver engaged a local vendor to prepare an aerial online video tour of the Newport Beach Club development site. The Receiver also engaged Northeast Engineering to assist the Receiver in answering diligence questions and providing potential bidders with information and prior plans and documents regarding the Newport Beach Club development.

With the Court's approval, the Receiver engaged the real estate brokerage firm of Cushman & Wakefield/Hayes & Sherry (CWSH), a premier real estate services firm with more than 11,000 employees operating in sixty-nine (69) countries.

Further, CWSH had experience marketing and selling properties like the Newport Beach Club, such as The Village at Mt. Hope Bay in Tiverton, Rhode Island. In coordination with CWSH, the Receiver developed a detailed offering memorandum which was directly distributed to all potential bidders in the marketplace expressing an interest in the development opportunity. Moreover, the Newport Beach Club was marketed to 9,357 local, regional, and national

investors/developers through the combined efforts of CWHS and the Receiver. In addition to directly marketing the Subject Property to regional and national developers, CWHS also utilized its network to advertise the Subject Property to over 90,000 real estate investors throughout North America. Further, CWHS advertised the property on several websites which were viewed by over 6,000 parties. The Receiver has also worked with CWHS to coordinate site visits, as well as facilitate several conferences, with potential bidders for the Subject Property.

After providing an opportunity for the marketplace to conduct diligence into the marketing materials, the Receiver, after consulting with CWHS, scheduled a call for offers for October 23, 2020. Thereafter, the Receiver undertook efforts to engage in communications with the four (4) offerors to further discuss their offers and contingencies contained within those offers. Further, the Receiver undertook to explain the Receivership process to each offeror and explained that each offer was subject to higher and better bids at the sale hearing. The Receiver also prepared and provided each offeror with a form of Purchase and Sale Agreement that outlined each offeror's contingencies.

Subsequently, the Receiver determined that the offer from Greylock Properties, doing business as Newport Beach Club, LLC (Buyer) for the sum of Six Million and 00/100 Dollars (\$6,000,000.00) (Stalking Horse Offer), was the highest and best bid. The Receiver accepted, subject to this Court's approval, and higher and better bids, the Stalking Horse Offer and entered into a Purchase and Sale Agreement. Section 18 of that agreement conditioned the buyer's obligation on several conditions, the most significant being obtaining certain approvals from the Town of Portsmouth to modify the development plan for the Subject Property.

On or about October 30, 2020, the Receiver filed a Petition to Sell the Receivership Estate's assets, based upon the Stalking Horse Offer. Pursuant to the Petition, on November 12, 2020, the

Receiver, under the auspices of the Court and in the Court and by WebEx and Zoom, conducted a competitive sale process for the sale of the Newport Beach Club.

An essential element of the sale process was for any bidder to establish to the satisfaction of the Receiver “proof of funds” meaning the financial wherewithal to close on the purchase. At the conclusion of the competitive auction process, the Receiver recommended that the Court accept the bid of Diamond Residences, LLC (Diamond) for Nine Million One Hundred Fifty Thousand (\$9,150,000) Dollars. That offer did not contain the contingencies that were in the Stalking Horse Offer.

Ocean Developers Partners, LLC (ODP) had bid Nine Million Two Hundred (\$9,200,000) Dollars. However, the Receiver did not recommend its bid for two reasons. First, prior to the sale hearing, ODP provided the Receivership Estate with documentation demonstrating its ability to make a cash bid up to a maximum amount of \$6.2 Million. Rather than disqualifying ODP, the Receiver, at ODP’s request, allowed ODP to continue to bid at a higher-level subject however, to a finance contingency. At the sale hearing, ODP acknowledged that the bidding at the conclusion of competitive bidding exceeded its proof of funds but it asked for four days to provide such proof. However, its bid also included the contingencies in the Stalking Horse Offer while the bid of Diamond Residences did not. The Receiver felt that even if ODP could provide proof of funds, Diamond’s bid was preferable because of the lack of contingencies. During the hearing on the Receiver’s recommendation, the following colloquy took place among the Court, the Receiver and counsel for ODP.

“MR. ATCHISON: . . . Again, to update the Court, my client has advised me that proof of funds are [sic] available – INAUDIBLE – he’s also advised me that he intends to match the contingencies and has a higher amount of funds available as we speak.

“MR. RUSSO: . . . but the bidding is closed. You can’t change the contingencies. Perhaps – obviously, the decision is yours, but I won’t be able to recommend that.

“THE COURT: Yeah, I mean, at some point a hammer has to come down, and apparently it has . . . you can’t change your bid after the fact that it’s closed, Mr. Atchison. It’s nice that they’re now willing to accept those contingencies. It would have been good if they did it before Mr. Russo closed, and there has to be some integrity to a process. I can’t have receivers conducting auctions and then having them be re-opened after they have ended.” (Hr’g Tr. 20:6 – 21:1, Nov. 12, 2020.)

In *Freeman v. Poole*, the Rhode Island Supreme Court highlighted the finality of an auction sale rule articulated in the 1789 English case, *Payne v. Cave*, which was later accepted by the English Sale of Goods Act, 1893 and embodied in section 58 (2) of the Act where it states that “A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. . . .” 37 R.I. 489, 93 A. 786, 792 (1915).

The Court then accepted the recommendation of the Receiver that Diamond was the highest and best offer. The Court then accepted several backup bidders, including ODP, on the condition that ODP provide the Receiver with satisfactory proof of funds.

On November 25, 2020, after resolving a dispute on the contents of an order, the Court entered an Order approving the sale to Diamond and accepting several backup bids. (Sale Order) Subsequently, on December 16, 2020, ODP filed an appeal of the Sale Order.

On January 12, 2021, the Receiver filed the instant Motion asking the Court to hold the appeal in abeyance until ODP clarified its basis for an appeal or in the alternative require ODP to post a bond for \$9.15 Million pending the outcome of its appeal. Thereafter, on or about January 20, 2021, the Court heard via WebEx initial arguments in connection with the Motion. Counsel for ODP stated that the basis for its appeal is that it considered itself the highest and best bidder and objected to the bond. The Purchase and Sales Agreement with Diamond (the Diamond Agreement)

obligated Diamond to proceed with the purchase even if an appeal were pending, unless a stay of the sale had been ordered. The Court felt the Motion for a bond was premature because there was no indication at the time that the appeal was an impediment to the closing. The Court passed the motion and authorized the Receiver to reschedule the Motion on three days' notice.

The closing under the Diamond Agreement was to take place on or before February 8, 2021. Prior to that date, counsel for the Receiver advised the Court that counsel for Diamond had been hospitalized with COVID-19 and that several matters essential to the closing had not happened due to this unfortunate circumstance. The Court instructed the Receiver to petition for instructions and to set the matter on for February 15, 2021 to provide all parties enough time to reply to the request.

A WebEx hearing was held on February 15, 2021 and ODP and the secured creditor objected to any extension of the Diamond Agreement and urged the Court to forfeit Diamond's \$600,000 deposit. Even though the Diamond Agreement provided that time was of the essence, the Court, in light of the serious illness occasioned by the pandemic, felt it fair and equitable to extend the closing until March 9, 2021. As a condition of the extension, the Court increased the purchase price by \$3,000 per day until the closing. This amount approximated interest on the purchase price and, therefore, would compensate the Receivership Estate and the secured creditor for the slight delay.

On February 26, 2021, the Receiver, as had been authorized in the January 20, 2021 hearing, renewed its motion to require a bond from ODP. The Court held a WebEx hearing on March 1, 2021 and reserved decision for a few days and similarly continued the closing.

The Receiver advised the Court that Diamond's title insurer believes that ODP's appeal presents a cloud on title to the Subject Property and that without a bond it will take an exception

in the title policy. Counsel for the secured creditor, who is one of the approved backup bidders, also advised the Court that it has been similarly advised by its title insurer and that it would not close with this cloud on title. By email dated March 1, 2021, Mark Comstock, Vice President/Rhode Island State Director and Counsel for Chicago, Commonwealth and Fidelity National Title Ins. Co., advised counsel for the Receiver as follows: “We will issue an Owners and Lenders policy without exception assuming bond is posted in the amount of the purchase price.” *See* Exhibit A attached hereto.

Those who oppose the Receiver’s request argue that there is no financing contingency in the Diamond Agreement and if Diamond’s lender will not proceed without a title policy, then Diamond should be defaulted. That argument overlooks the Sale Order which provides in paragraph 5, “The Subject Property is hereby sold free and clear of all liens, claims, encumbrances, pre-petition assessments, and clouds on title . . .” Consequently, if there is a cloud on title, it is the Receiver who cannot perform, not Diamond. The Court and the Receiver believe that if the sale to Diamond proceeded to closure it would moot ODP’s appeal. The Supreme Court has stated “Upon our review of the paper in this case, we conclude ... that the sale of real property which is the subject of this appeal has rendered the appeal moot.” *Alegria v. One Lot of Land*, No. 06-39-A (R.I. Apr. 14, 2006)); *See also In re Four Star Truck & Travel Center, Inc.*, No. 93-415-A (Sept. 23, 1993). Similar decisions have been rendered in the federal courts in the bankruptcy context. *See In re Stadium Management Corp.*, 895 F.2d 845, 847 (1st Cir. 1990). However, this Court, based on its experience in the practice of law and on the bench, recognizes that title insurers occasionally will find a cloud on title even if the Supreme Court has ruled on an issue. Therefore, it is the Receiver who cannot deliver the Subject Property free and clear of a cloud on the title as required by the Sale Order, and not Diamond who cannot perform.

ODP has not requested a stay pending appeal because if it had, a condition of the stay would be posting a bond. ODP argues that there is no need to post a bond because if its appeal succeeds, it will buy the Subject Property and if the appeal is dismissed, then Diamond can buy the Subject Property. This assertion rings hollow. It ignores the fact that Diamond might not be willing to wait the one to two years that an appeal may take. Diamond can no longer be bound to the Diamond Agreement if the Receiver cannot deliver title free of this cloud. Moreover, there is no assurance that ODP could perform at the end of its appeal period. Notwithstanding that it asserted that it had proof of funds at the November 12, 2020 auction, despite repeated requests from the Receiver, it did not produce proof of funds until February 15, 2021 when it provided the Receiver with a financing commitment letter from the Raymond Green Trust dated February 14, 2021. The commitment expires thirty days from its execution unless extended by the lender. Thus, there is absolutely no assurance that ODP could close if it were successful in its appeal. ODP is trying to obtain a free stay pending appeal, and that is not in the interest of the Receivership Estate.

ODP has filed memoranda objecting to the Receiver's request. Much of its opposition relates to the Receiver's request to hold the appeal in abeyance. The Court has no intention to do that because it is for the Supreme Court to determine if its appeal has merit.

ODP has also attempted to increase its bid as recently as February 28, 2021. Apparently prior to the Receivership, ODP filed suit against the owners of the Newport Beach Club contending it had an agreement to purchase the property and even filed a *lis pendens*. It then filed on October 15, 2020 a claim for \$1.3 Million representing its deposit pursuant to that alleged agreement. It now proposes to use that claim as a credit bid, thus contending that its bid is really \$10.5 Million. Interestingly, ODP has never sought to have that claim allowed and one can only credit bid with the Court's permission, which it never sought. Moreover, even if its claim were allowed it would

be unsecured, and since the Subject Property is being sold for substantially less than the secured claim, it is of no value and this so-called bid is illusory.

The Rhode Island Business Calendar has been lauded for its ability to efficiently and relatively cost effectively liquidate insolvent businesses. Its ability to do so emanates in part from the knowledge that good faith purchasers can rely on its procedures. To allow an allegedly aggrieved bidder to appeal and order of sale and not seek a stay thus creating a cloud on title would undermine the confidence that exists in the Business Calendar's efficacy. If a stay is requested, a bidder has a chance to convince either the Superior Court or the Supreme Court that there is some merit to its appeal. If so successful, a bond would be posted, and the Receivership Estate would be protected. By not requiring a bond in this case the Court is inviting a disappointed bidder in any case to prevent an orderly Court approved sale.

The Court believes that ODP has attempted at every turn to undermine a well-established procedure for administering receivership estates. It did so at the auction by saying that it had proof of funds, evidence of which it could provide in four days. Yet, that proof was never provided and in fact never existed until three months later. It changed its bid by removing certain contingencies after the Receiver had closed the bidding. It filed an appeal as is its right but never sought a stay, even though the current law is that a sale would moot its appeal. It filed opposition to this Motion just minutes before the hearing on March 1, 2021 by attempting to offer a higher bid and submitting an affidavit filled with hearsay statements from the principal of Diamond, which attacked the good faith representations of Diamond's counsel.

Rule 7 of the Supreme Court Rules of Appellate Procedure provides as follows:

“Rule 7. Trial court orders for protection of parties pending appeal or petitions for review. – (a) Trial Court Orders for Protection of Parties. *The justice or judge of the Superior, Family, or District Court who entered the judgment, order, decree, or other*

determination from which review is being sought, or in case of his or her absence or disability, any justice or judge of the same court, ***may make*** such orders for injunction, giving bond, and the appointment of receivers, and ***such other orders as are needed for the protection of the rights of the parties until the appeal or petition for review shall be heard and determined by the Supreme Court***, subject to modification or annulment by order of the Supreme Court upon motion.” Supreme Court Rules of Appellate Procedure 7 (emphasis added).

The plain language of Rule 7 authorizes the Court to order a bond for the protection of the parties pending an appeal. In addition to the Court’s authority under Rule 7, the Court also has general equitable authority to enter an order compelling a bond. In turn, the Court has general equity powers to issue orders, injunctions, and decrees that justice and equity require. *See Francis v. Buttonwood Realty Co.*, 765 A.2d 437, 443 (R.I. 2001) (“Legislature has granted broad powers of control to enable the court in a receivership proceeding to conserve the interests of all parties involved.”).

Diamond represents that is prepared to close, but the Receiver is unable to deliver clear title. Absent the posting of a bond, the pending appeal only serves to prevent the current Court-approved sale from closing, which will cause the Receivership Estate to incur unnecessary and substantial expenses and delay in the administration of these proceedings. In addition, the failure to close acts to the detriment of the secured creditor and other parties who have an interest in the Newport Beach Club development, including current condominium owners who are entitled to see this development completed and an adjacent landowner who has easement and leasehold rights in the Subject Property.

For the foregoing reasons, pursuant to Appellate Rule 7(a) and the Court’s equitable powers, the Court finds that in order to protect the rights of the parties and other interested persons, it is ordering ODP to post by 4:00 p.m. on March 12, 2021 a bond or other appropriate security in

the amount of \$9.15 Million pending the outcome of its appeal which is pending in the Supreme Court. The closing on the Diamond Agreement is continued until on or before March 16, 2021, and because it is the Receiver who is not able to deliver clear title, the \$3,000 per day increase in the purchase price will cease being accrued after March 9, 2021.

The Receiver shall prepare an Order immediately and if counsel have any objection to the form of the order, it shall be emailed to the Court by 10:00 a.m. on Monday, March 8, 2021.

Exhibit A

From: John Dorsey <jdorsey@frlawri.com>
Sent: Monday, March 1, 2021 2:46 PM
To: Licht, Richard <rlicht@courts.ri.gov>
Cc: Mark Russo <mrusso@frlawri.com>
Subject: FW: Newport Beach Club

EXTERNAL EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.
Your Honor:

As a brief update from this morning's hearing, the Estate has confirmed that the title insurer will issue title free of exception relative to the appeal, upon the posting of the requested bond. We've included the e-mail string confirming the title insurer's position for reference below.

We are assembling the remaining materials that Your Honor requested and will send by separate e-mail shortly.

Thank you.

John A. Dorsey, Esq.

Ferrucci Russo P.C.

55 Pine Street, 3rd Floor
Providence, RI 02903

Tel.: (401) 455-1000 Fax:

(401) 455-7778

jdorsey@frlawri.com

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From: Comstock, Mark <Mark.Comstock@CTT.com>
Sent: Monday, March 1, 2021 2:37 PM
To: John Dorsey <jdorsey@frlawri.com>

Cc: attysml@aol.com; irussell@apslaw.com; ddufault@apslaw.com; Mark Russo
<mrusso@frlawri.com> Subject: RE: Newport Beach Club

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John,

We will issue an Owners and Lenders policy without exception assuming bond is posted in the amount of the purchase price. Please call with any questions.

Mark F. Comstock Esq.

Vice President/Rhode Island State Director and Counsel

Chicago, Commonwealth and Fidelity National Title Ins. Co.

One State Street Suite 600

Providence, Rhode Island 02908

401-431-0900

401-450-3757 Fax

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From: John Dorsey <jdorsey@frlawri.com>

Sent: Monday, March 1, 2021 2:30 PM

To: Comstock, Mark <Mark.Comstock@CTT.com>

Cc: attysml@aol.com; irussell@apslaw.com; ddufault@apslaw.com; Mark Russo
<mrusso@frlawri.com>

Subject: Newport Beach Club

IMPORTANT NOTICE - This message sourced from an external mail server outside of the Company. Dear Mark:

We wanted to take an opportunity to write regarding the above referenced matter. As an update, we had a hearing earlier today on the Receiver's Motion to Post Bond and the Court has taken the Motion under advisement and will issue a decision on Wednesday or Thursday this week.

In turn, the Court has asked the Receiver to confirm that if the Court is inclined to grant the Receiver's request for a bond, that upon the posting of the bond, the insurer will be prepared to remove the appeal exception from the lender and buyer policies, in order to effectuate a closing.

When you get a moment if you can please confirm in order that we may follow up to advise the Court.

Thank you for your time and continued assistance with this matter.

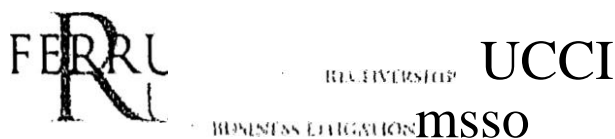
John A. Dorsey, Esq.

Ferrucci Russo Dorsey P.C.

55 Pine Street, 3rd Floor
Providence, RI 02903

Tel.: (401) 455-1000
Fax: (401) 455-7778
jdorsey@frlawri.com

Please visit our website at: www.frlawri.com



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RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Jennifer L. Tinsman v. Velocity NBC, LLC, et al.

CASE NO: C.A. No. NC-2020-0123

COURT: Newport County Superior Court

DATE DECISION FILED: March 5, 2021

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

For Plaintiff: William M. Dolan, Esq.; Danielle E. Dufault, Esq.

For Defendant: SEE ATTACHED LIST – Interested Parties

**The Condominium Association of TNBC Village Association,
Pamela A. Baker, NAE Trust**

- Justin T. Shay, Esq.
jshay@cm-law.com

INTERESTED PARTIES:

Aquidneck Country Club, Inc.

- Robert D. Wieck, Esq.
rwieck@wdglaw.com

Group members who do not own NBC homes

- Theodore Orson, Esq.
torson@orsonandbrusini.com
- Giovanni La Terra Bellina, Esq.
jlaterra@orsonandbrusini.com

III CRE Bridge Loan Fund, L.P.

- Gardner H. Palmer, Esq.
ghpalmer@dioriolaw.com
- Joseph M. DiOrio, Esq.
jmdiorio@dioriolaw.com

Colleen McDonough

- Stephen E. Breggia, Esq.
sbreggia@alphalaw.us

Ocean Development Partners, LLC

- James G. Atchison, Esq.
jatchison@darroweverett.com

Diamond Residences, LLC

- Stephen M. Litwin, Esq.
attysml@aol.com

**W. Mark Russo, In and Only In His Capacity as Permanent Receiver
For the Receivership Entities**

- John Andrew Dorsey, Jr., Esq.
jdorsey@frlawri.com