

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

MAR 26 2015

TIM RIDDERS
CLERK OF COURT
30

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
Seabrooke Investments LLC, *et al.*,)
)
Defendants.)

Case No. CJ-2014-4515

**OKLAHOMA DEPARTMENT OF SECURITIES' RESPONSE TO
FIRST COMMERCIAL BANK'S APPLICATION FOR ORDER
TO DISBURSE ESCROWED FEES**

The Oklahoma Department of Securities (Department) *ex rel.* Irving L. Faught, Administrator, respectfully responds to the *First Commercial Bank's Application for Order to Disburse Cherry Hill Escrowed Fees to First Commercial Bank* (Application for Disbursement).

On August 11, 2014, Defendants and their assets, including the Cherry Hill Apartments, became subject to the receivership and asset freeze imposed herein. The Cherry Hill Apartments were owned by Defendant Cherry Hill LLC and were a large asset of the receivership. On November 5, 2014, the Cherry Hill Apartments were sold by the Receiver for \$1,015,000.

The vast majority of the proceeds from the sale of the Cherry Hill Apartments were paid to First Commercial Bank (FCB) in satisfaction of its mortgage on the property that was originally issued in June, 2011. The payment of \$879,275.37 to FCB included the balance of the principal and interest owed. FCB notified the Receiver, in preparation for the closing of

the sale of the Cherry Hill Apartments, that it sought reimbursement of attorney fees of \$22,538.00 (Attorney Fees) but provided no substantiation for the claim. FCB has still provided no substantiation for the Attorney Fees.

Before and after the purchase by Defendants of the Cherry Hill Apartments in June, 2011, Defendants commingled investor funds among numerous bank accounts and Defendants represented to some investors that their investments would be secured by equity interests in the Cherry Hill Apartments. There were insufficient funds remaining after the payment of the mortgage of FCB to pay investors whose funds were represented by Defendants to be secured by equity interests in the Cherry Hill Apartments. In fact, the Receiver was required to bring money to the closing of the sale of the Cherry Hill Apartments as there were insufficient proceeds remaining to pay closing expenses in full.

First Commercial Bank and the Receiver, in order to complete the sale of the Cherry Hill Apartments, executed an agreement to escrow funds in an amount equal to the Attorney Fees claimed by FCB. On January 7, 2015, FCB filed its Application for Disbursement seeking the payment from escrow of the Attorney Fees.

FCB'S APPLICATION FOR DISBURSEMENT UNDERMINES THE CLAIMS PROCESS

The purpose of appointing a receiver in a securities enforcement action is to effect an "orderly and efficient administration of the estate." *FTC v. 3R Bancorp*, 2005 WL 497784, *3 (N.D. Ill. Feb. 23, 2005) (citing *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986)). The Receiver in this case was appointed to provide investors and other creditors with an officer to marshal assets quickly, fairly, and systemically for the benefit of all creditors. Allowing any non-party to receive a priority consideration undermines the very purpose of the equity receivership. *SEC v. Nadel*, 2009 WL 3100285 (M.D.Fla.)

In *SEC v. Nadel, supra*, a secured creditor sought a determination by the Court of the value and priority of a claim. The Court refused to consider the claim stating that the whole purpose of an “equity receivership imposed at the request of a government agency such as the SEC” is to “remedy violations of the securities laws for the benefit of investors.” *Id.* In denying relief to the secured creditor, the Court stated that the consideration of creditors’ priorities should be done “in a single setting when all creditors have had a chance to submit claims and will have notice and an opportunity to be heard.” *Id.*

FCB has the opportunity to make a claim for the Attorney Fees in the Court-approved claims process, at which time it will have the value and priority of its claim determined along with those of all other claims in a single, efficient proceeding. The current request for priority consideration by FCB is unwarranted and inconsistent with the Court ordered claims process. FCB is in the enviable position of having received payment in full of principal and interest in November 2014. The only remaining issue is whether its Attorney Fees will be paid from the receivership estate. When, as here, a creditor’s only potential “injury” would be a delay in enforcing its right, early consideration is unwarranted. *See FTC v. Med Resorts Int’l, Inc.*, 199 F.R.D. 601, 607-609 (N.D. Ill. 2001). As this Court has previously held, the claims process will afford due process to all investors and creditors, including FCB. *Oklahoma Department of Securities v. Blair*, 231 P.3d 645 (OK 2010).

B. FCB FAILS TO DESCRIBE ATTORNEY FEES

FCB originally made a loan to Cherry Hill LLC for the purchase of the Cherry Hill Apartments in June, 2011. No attorney fees were ever reduced to a numerical value in the loan documents or in renewals of the loan and there has been no delineation or description of

the Attorney Fees claimed herein. Payment of Attorney Fees must be denied without substantiation and justification of the claim.

CONCLUSION

Since filing this case, the Department has persisted in seeking to preserve Defendants' assets for the payment of restitution to victims of Defendants' securities law violations. This has included making equitable challenges to and defending challenges from situations that would negatively impact these victims. The Department respectfully requests that this Court deny the FCB Application for Disbursement and order the release of the escrowed funds to the Receiver, while preserving the right of FCB to make a claim for Attorney Fees in the claims process.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:


Patricia A. Labarthe, OBA #10391
Jennifer Shaw, OBA #20839
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
(405) 280-7700 Telephone
(405) 280-7742 Facsimile
plabarthe@securities.ok.gov
jshaw@securities.ok.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of March, 2015, a true and correct copy of the above and foregoing was emailed to the following:

Mark A. Robertson, OBA #7663
Michael Paul Kirschner, OBA #5056
Robertson & Williams
9658 N May Ave Ste 200
Oklahoma City OK 73120
Telephone: (405) 848-1944
Facsimile (405) 843-6707
mark@robertsonwilliams.com
mike@robertsonwilliams.com

and

Jim W. Lee, OBA #5336
Lee & Kisner
One Broadway Executive Park Ste 230
201 NW 63rd St
Oklahoma City OK 73116
Telephone: (405) 848-5532
Facsimile: (405) 848-5502
jimlee@legalassociatesllc.net
Attorneys for Defendants

Robert D. Edinger, OBA #2619
Robert Edinger PLLC
116 E Sheridan Ste 207
Oklahoma City OK 73104
Telephone: (405) 702-9900
Facsimile: (405) 605-8381
redinger@edingerpllc.com
Attorney for Receiver

Rollin Nash, Jr., OBA #6584
Nash Cohenour Kelley Giessman
& Knight P C
4101 Perimeter Center Dr Ste 200
Oklahoma City OK 73112
Telephone: (405) 917-5000
Facsimile: (405) 917-5005
rnash@nashfirm.com
Attorney for Quail Creek Bank

John M. Thompson, OBA #17532
Crowe & Dunlevy
Braniff Building
324 N Robinson Ave Ste 100
Oklahoma City OK 73102
Telephone: (405) 235-7774
Facsimile: (405) 272-5924
John.thompson@crowedunlevy.com
Attorney for Bank of the West

R. Stephen Haynes, OBA #4009
R. Stephen Haynes, P C
First Commercial Bank Bldg
3805 W Memorial Rd
Oklahoma City OK 73134
Telephone: (405) 330-9696
Facsimile: (405) 302-5538
shaynes@haynespc.com
Attorney for First Commercial Bank

David L. Nunn, OBA #14512
212 E Second St
P O Box 230
Edmond OK 73083-0230
Telephone: (405) 330-4053
Facsimile: (405) 330-8470
dnunn@davidlnunnpc.com
Attorney for First National Bank Weatherford

