

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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TIM RHODES
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Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
Seabrooke Investments LLC, an Oklahoma)
limited liability company; *et al.*,)
)
Defendants.)

Case No. CJ-2014-4515

**OKLAHOMA DEPARTMENT OF SECURITIES' RESPONSE TO OBJECTION BY
FIRST COMMERCIAL BANK TO RECEIVER'S APPLICATION**

The Oklahoma Department of Securities (Department), *ex rel.* Irving L. Faught, Administrator, respectfully submits this response to the objection of First Commercial Bank (FCB) to the Receiver's Interim Application for Order Approving Receiver's Fees and Expenses for the period of August 11, 2014 through August 31, 2014 (Application).

BACKGROUND

On August 11, 2014, the Department filed a verified *Petition for Permanent Injunction and Other Relief* (Petition) against the named Defendants pursuant to the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§1-101 through 1-701 (2011). On August 11, 2014, this Court entered the *Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting*, appointing Ryan Leonard as Receiver (Receiver) for the assets of the Defendants including the Cherry Hill Apartment Complex and certain property in Weatherford, Oklahoma (collectively, the "Relevant Property").

On August 19, 2014, a hearing was held and testimony was presented on the Department's application for a temporary injunction and Defendants' motion to vacate the temporary restraining order. This Court entered the *Temporary Injunction and Ancillary Relief* (Temporary Injunction) and ordered the continuation of the receivership and the asset freeze over the Defendants.

On September 3, 2014, the Receiver filed the Application and on September 22, 2014, the Department received an objection to the Application filed by FCB.

SCOPE OF THE RECEIVERSHIP

This is a case involving a massive securities fraud perpetrated by Defendants in and from the state of Oklahoma. Defendants' illegal conduct spanned a time period of at least ten years with the offer and sale of investments to multiple investors both in and out of the state of Oklahoma. Investor funds, totaling in excess of Five Million Dollars (\$5,000,000), were deposited by Defendants to numerous bank accounts, including large investor deposits to the personal bank account of Tom and Karyn Seabrooke. Defendants have commingled and transferred investor funds among various bank accounts for expenses, including those of the Relevant Properties, without attention to investment purpose and without distinguishing between personal expenses and business expenses. Investor funds paid for personal expenses of the Defendants and business expenses unrelated to the investments sold.

Since his August 11, 2014 appointment, the Receiver has worked diligently and efficiently to unravel the business and personal web created by the Defendants. The Receiver's appointment extends to six entities and two individuals. Defendants had thirty-five (35) bank accounts and forty-three (43) loan accounts among a group of seven banks including FCB. Defendants had assets that included the Bricktown Hotel and Convention

Center (Bricktown Hotel), a property management company, and a real estate business with properties in Oklahoma, Custer, Payne, and Comanche Counties. Forty employees staffed the Bricktown Hotel and seven other persons were employed for the remaining Defendants.

The Receiver has managed the Relevant Property pursuant to this Court's order including, but not limited to, the collection of rents for the Cherry Hill Apartment Complex, the payment of salaries to the employees of the Cherry Hill Apartment Complex, and the supervision and maintenance of the Relevant Property. The financial condition of the receivership is dire and since the Receiver's appointment, several banks, including FCB, have threatened to foreclose on receivership assets. The Receiver has been engaged in negotiations with numerous creditors regarding all assets of the receivership and evaluating all affected persons' claims.

In his first month of work, the Receiver identified liquid assets of less than \$100,000. While some other assets have value, estimated restitution claims from investors will substantially exceed the value of the receivership assets.

AUTHORITIES

Section 1-603 of the Act authorizes the District Court to issue a permanent or temporary injunction, restraining order, or declaratory judgment, and to order appropriate or ancillary relief in a case involving a violation of the Act. In *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334, 1338 (Okla. 1980), the Supreme Court of Oklahoma reviewed a case brought by the Oklahoma Department of Securities wherein the defendants, both individual and corporate, were alleged to have engaged in violations of the registration and anti-fraud provisions of the Act. The Court stated that Districts Courts of Oklahoma have equitable powers in actions brought under the Act and, "[o]nce the equity jurisdiction of

the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies.” *Id.* Likewise, it is well established that districts courts have “broad powers and wide discretion to determine the appropriate relief in an equity receivership.” *S.E.C. v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992.)

Under the authority of Section 1-603(B) of the Act, this Court appropriately ordered the Temporary Injunction, finding a justifiable basis to believe that Defendants have engaged in violations of the Act. The Temporary Injunction issued herein specifically authorizes payment of the Receiver’s fees and expenses and elevates such payments to a level of priority as follows:

“IT IS FURTHER ORDERED that the Receiver may apply to the Court for payment of fees, from time to time, in a reasonable sum to be determined by the Court and from such sources as approved by the Court and for reimbursement of reasonable expenses incurred in connection with his duties as Receiver. The Receiver’s hourly fee shall be billed at the rate of \$265.00 per hour, which rate shall not be increased without order of the Court. Payment of the fees and expenses of the Receiver shall have priority over any other claims made against the Defendants or the receivership estate.”

It is consistent with the equitable authority of this Court to have issued the Temporary Injunction authorizing the payment of the fees and expenses of the Receiver and establishing priority to the Receiver “over any other claims made against the Defendants or the receivership estate.” Additionally, this Court has equitable jurisdiction to determine the source of funds that will be used to make such payments.

In *Brown v. Bivings*, 316 P.2d 855, 859 (Okla. 1957), the Oklahoma Supreme Court considered fees and expenses of a receivership and cited to 45 Am.Jur, Sec 281:

“Receivers ordinarily have a right to compensation for their services and expenses, and such right is a strong equity, analogous to an obligation founded upon an implied contract, and is not dependent upon the mere arbitrary discretion of the court, if the appointment of the receiver was regular and his conduct has been free from exception.”

The *Brown* court went on to cite to 45 Am.Jur., Sec 275 as follows:

“The general rule is that the costs and expenses of a receivership, including compensation for the receiver, counsel fees, and obligations incurred by him in the discharge of his duties, constitute a first charge against the property or funds in receivership, irrespective of who is ultimately successful in the suit or is ultimately liable to pay them, at least in the absence of want of authority, impropriety, or wrongfulness in the obtaining of the receivership.” *Id.* at 859.

Here there has been no assertion by FCB that there was any error in obtaining this receivership or any concern with the conduct of the Receiver. Further, in *Sinopoulo v. Portman*, 137 P.2d 943, 947 (Okla. 1943), the Court stated that the receiver is an arm of the court, and that the expenditures incurred by the court during a receivership are in reality costs of administration.

FCB cites no case law or legal authority for its objection to the Receiver’s Application. Instead, FCB claims to be an “Interested Party” as a secured creditor under a promissory note and mortgage on the Relevant Properties. FCB is not a party to this action but is a creditor entitled to participate in a claims process. FCB is not entitled to a priority of claim over the receivership expenses. In *Hyland v. Anchor Fin. Co., Inc.*, 146 N.J. Super. 102 (App. Div. 1977), a bank sought to compel a receiver to turn over accounts receivable that had been pledged as security for a bank loan to the defendant. In rejecting the bank’s motion, the court held that even though the bank was a secured creditor with priority over other creditors, its claim did not have priority over or come ahead of the expenses of the receivership and that the bank was not entitled to the immediate distribution of the accounts

receivable from the receivership assets. *Id.* at 106. The receivership costs have priority over the claims of a secured creditor. *Id.* at 107.

The Receiver, as an arm of the Court, has taken actions that benefit FCB. In doing so, the Receiver may be awarded fees and expenses from the income or out of the corpus of the Relevant Property. *S.E.C. v. Elliott, supra* at 1576. This benefit to a secured party may be subtle but even though a receiver may not have increased or prevented a decrease in the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation. *Id.* at 1577. By conferring a benefit on the secured creditor, a receiver merits fees even from the creditor's collateral. *Id.*

In *Sinopoulo v. Portman, supra* at 947, the Oklahoma Supreme Court considered the expenses of a receivership case and stated:

“The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called expenses of preservation, may be incurred under the order of the court on the credit of the property; and it follows from necessity, in order to the effectual administration of the trust assumed by the court that these expenses should be paid out of the income, or, when necessary, out of the corpus, of the property, before distribution, or before the court passes over the property to those adjudged to be entitled.”

Thus, it is clear that the language of the Temporary Injunction and supporting case law provide authority for the payment of the fees and expenses of the Receiver and the first priority of such payment.

CONCLUSION

In light of the facts presented and authorities cited herein, and the absence of authority to support the FCB objection, the Department respectfully requests that the objection of FCB to the Receiver's Application be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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