

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SEP - 5 2014

TIM RHODES
COURT CLERK

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Oklahoma Department of Securities)
<i>ex rel</i> Irving L. Faught, Administrator,)
)
Plaintiff,)
)
vs.)
)
Seabrooke Investments, L.L.C., et al.,)
)
Defendants,)
)
vs.)
)
Quail Creek Bank,)
)
Intervenor.)

Case No. CJ-2014-4515

**QUAIL CREEK BANK'S APPLICATION FOR EMERGENCY ORDER
PERMITTING INTERVENTION AND BRIEF IN SUPPORT**

COMES NOW Quail Creek Bank and for its Application for Emergency Order Permitting Applicant to Intervene in the above-entitled cause, and for an expedited hearing on the same, respectfully submits the following:

BACKGROUND FACTS

1. Plaintiff sought and obtained the appointment of a Receiver to take charge of the Defendant's various entities and properties. One of those entities, which is a Defendant, is Bricktown Capital, LLC, ("Bricktown"), which owns and operates the Bricktown Hotel and Convention Center (the "Hotel").

2. In October, 2007, Bricktown obtained a purchase money loan from Applicant Quail Creek Bank (the "Bank"). As part of that transaction, Bricktown executed and

delivered to Bank a certain mortgage (“Mortgage”) which was recorded on October 17, 2007, in Book 10637, at Page 219 et seq., which said Mortgage is incorporated by reference herein pursuant to 12 O.S. § 305.1. Since October, 2007, to this date, the Bank has maintained a first and prior mortgage lien on the Hotel.

3. Bricktown also delivered to Bank its Security Agreement pledging all of Bricktown’s personal property to Bank. The Bank perfected its lien on all such personal property on October 19, 2007. A copy of said UCC-1 filing is attached as Exhibit “1”.

4. As of August 12, 2014, the Bank was owed \$1,855,679.19, with interest accruing thereafter at the rate of \$306.11 per diem. Therefore, Bank has a significant interest in the Hotel to protect.

5. Pursuant to the subject Mortgage and Security Agreement, the Bank therefore claims a first and prior lien on all real and personal property owned by Bricktown.

6. At a prior hearing on August 19, 2014, testimony and statements were made to this Honorable Court to the effect that whatever value the Hotel has as a functioning hotel, that if the Hotel were to close, that the value of the Hotel would decrease by approximately one-half (50%).

7. On September 3, 2014, the Receiver filed his certain Application seeking an expedited hearing to consider the ultimate disposition of the Hotel “*including the option of immediate closing of the Hotel*”. See Paragraph 4 on Page 4 of the Receiver’s Application. The expedited hearing on the Receiver’s Application is set for Tuesday, September 9, 2014, at 9:00 a.m. before this Honorable Court.

8. By virtue of the Receiver even suggesting that closure of the Hotel is a possibility confirms that the Receiver is not adequately representing the Bank’s interest.

9. If the Receiver closes the Hotel, the Bank's collateral will be substantially impaired. Additionally, unless Bank is permitted to intervene, Bank's ability to protect its interest in the Hotel will be impeded. 12 O.S. § 2024(A)(2).

10. As more fully set forth below, by virtue of Bank's Mortgage and lien on all of Bricktown's real and personal property, Bank claims a significant interest in the Hotel which is subject to this Receivership, and more importantly, the Hotel is the primary subject of the Receiver's Application.

11. The Court previously entered its certain Temporary Restraining Order ("TRO") on August 11, 2014. In relevant part, the TRO orders:

"IT IS FURTHER ORDERED that, except by leave of Court, during the pendency of this Order, all creditors... are hereby stayed and restrained from doing any act or thing whatsoever to interfere with the Receiver or to the possession of or management by the Receiver of the Assets or in any way to interfere with said Receiver, or to interfere in any manner during the pendency of this proceeding... ."

Because the TRO is so encompassing, procedurally speaking, the Bank must intervene in this proceeding before it would be able to request any kind of relief from this Court. Denying the Bank of the right to intervene would place the Bank in the position of being completely unable to protect its interests in the Hotel's real and personal property, which is contrary to all statutory and case authority cited below.

12. Accordingly, Bank should be permitted to intervene in this proceeding to protect its interest in the Hotel and to ensure that Bank's ability to protect its interest is not impeded.

13. Bank respectfully requests that this Honorable Court issue its Order to conduct an expedited hearing on this Application. Because the Receiver's Application to

determine the disposition of the Hotel is set for next Tuesday, September 9, 2014, at 9:00 a.m., this Application should be set for hearing at the same time so that Bank will be able to protect its interest in Bricktown and the Hotel. Delaying the Court's consideration of this Application to a date after the Receiver's Application is heard could result in significant impairment of the Bank's lien on Bricktown's real and personal property. As set forth above, the Receiver has already "opened the door" regarding the possibility of closing the Hotel. It is obvious that the Receiver is not concerned with protecting Bank's secured interest as a creditor of Bricktown.

BRIEF IN SUPPORT

A. **BANK HAS AN ABSOLUTE RIGHT TO INTERVENE IN THE CURRENT LAWSUIT**

Oklahoma Statute title 12 § 2024 provides that:

A. INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

1. When a statute confers an unconditional right to intervene; or
2. When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

The language of § 2024(A)(2) is also found in its federal counterpart, and Oklahoma looks to the federal court interpretation when applying similar language. *Brown v. Patel*, 2007 OK 16, ¶17. Oklahoma, following the federal courts, has interpreted the language of § 2024(A)(2) to embody four (4) requirements for a motion to intervene by right:

- (1) the motion to intervene must be timely;

(2) the intervenor must claim a significant protectable interest relating to the property that is the subject of the action;

(3) the disposition of the action will impair or impede the intervenor's ability to protect its interest; and

(4) the existing parties may not adequately represent the intervenor's interest.

Bank of Commerce v. Beakers, LLC, 2001 OK CIV APP 45, ¶10.

B. BANK'S APPLICATION IS TIMELY

The Oklahoma Supreme Court has specifically held that a motion to intervene is timely when it is filed within three months after the original petition. Tulsa Industrial Authority v. City of Tulsa, 2011 OK 57 ¶ 32. In Tulsa Industrial Authority, the Plaintiff filed its petition for declaratory judgment on August 17, 2007. The Intervenor filed his motion to intervene on November 6, 2007. *Id.* The Supreme Court rejected the Plaintiff's argument and found that the motion to intervene was timely as a matter of law. *Id.* In the present lawsuit, Bank files its Motion to Intervene less than one (1) month after the original petition. Therefore, this Court, like the Oklahoma Supreme Court in Tulsa Industrial Authority, should find that Bank's motion to intervene is timely.

C. PROOF OF A SIGNIFICANT, PROTECTABLE PROPERTY INTEREST

Bank is the first mortgage holder on the property by virtue of its Mortgage as referenced above. The Mortgage creates a lien upon the Hotel in order to secure payment of funds borrowed by Bricktown Capital. *See* 46 O.S. §42(3) (A mortgage is defined as "an instrument creating a lien upon real estate as security for payment of a debt.") Oklahoma has long recognized that an intervenor who establishes a lien on a subject property has an "absolute right to intervene in a proceeding." Morton v. Baker, 1938 OK 409, ¶ 4. Therefore,

Bank, as an undisputed mortgage lien holder, has an absolute right to intervene in this current matter.

In addition, Bank has a secured interest in Bricktown's personal property, which includes, but is not limited to, the receivables, accounts and contract rights of Bricktown and the Hotel. *See* copy of Security Agreement previously attached as Exhibit "1".

D. DISPOSITION OF THE ACTION WILL IMPAIR OR IMPEDE BANK'S ABILITY TO PROTECT ITS INTEREST

As set forth above in paragraph 7 of Applicant's "Background Facts", the Receiver is already proposing the possibility of closing the Hotel. If the Hotel is closed, the value of the Hotel will decrease dramatically and Bank's interest in the Hotel will therefore be significantly impaired.

Additionally, by virtue of the Receiver suggesting the possibility of closing the Hotel demonstrates that the Receiver is not attempting to protect the rights and interests of the Bank in Bricktown and the Hotel. Therefore, the Bank's interest is being impeded by the Receiver. Permitting Bank to intervene in this proceeding will help assure Bank that its interest in Bricktown and the Hotel will not be impaired or impeded.

E. EXISTING PARTIES WILL NOT ADEQUATELY REPRESENT BANK'S INTEREST

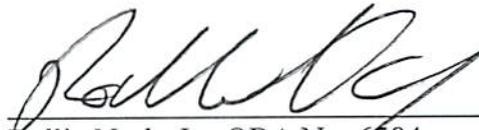
In determining if the current representation is adequate, the 10th Circuit Court of Appeals has explained that "representation is adequate 'when the objective of the applicant for intervention is identical to that of one of the parties.'" *Brown v. Patel*, 2007 OK 16, ¶ 18, quoting *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-Op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). Since none of the other parties hold a first security position in the property or in

the subject accounts receivables of the Hotel, none of the other parties have identical objectives as Bank. Only by allowing Bank to intervene can the Court be assured that Bank will be given every opportunity to fairly defend and protect its lien on the subject property.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Quail Creek Bank requests this Honorable Court to issue its Order expediting the hearing on this Application and to set the same for hearing on Tuesday, September 9, 2014, at 9:00 a.m. and that the Bank be permitted to intervene in this proceeding, all as set forth above.

Respectfully submitted,



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ATTORNEYS FOR QUAIL CREEK BANK

CERTIFICATE OF SERVICE

This certifies that on the 5th day of September, 2014, a true and correct copy of the above document was emailed to the following:

Via Email: plabarthe@securities.ok.gov

Via Email: jshaw@securities.ok.gov

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Jennifer Shaw
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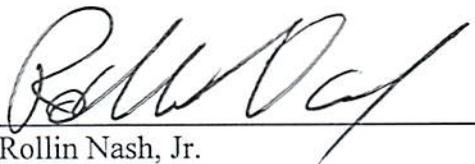
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Transaction #: 10838521

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Control Number:

Oklahoma County Number:

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Debtor (1)

Debtor Name:

Contact Name:

BRICKTOWN CAPITAL LLC

Type of Organization:

Jurisdiction of
Organization:

Organizational ID:

LLC

OK

Mailing Address:

City:

State:

Zip Code:

Country:

425 NW 11TH
STREETOKLAHOMA
CITY

OK

73103

USA

Secured Party (1)

Company Name:

Contact Name:

QUAIL CREEK BANK NA

CAROLE DAVIS

Mailing Address:

City:

State:

Zip Code:

Country:

P O BOX 20160

OKLA CITY

OK

73156

USA

Description of Collateral:

ASSIGNMENT OF LEASES AND RENTS FOR THE PROPERTY LOCATED AT 2001 E. RENO AVENUE, OKLAHOMA CITY, OK 73103 WITH A LEGAL DESCRIPTION OF: A PART OF THE SOUTHWEST QUARTER (SW/4) OF SECTION THIRTY-SIX (36), TOWNSHIP TWELVE (12) NORTH, RANGE THREE (3) WEST OF THE INDIAN MERIDIAN, OKLAHOMA COUNTY, OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING AT THE SOUTHWEST CORNER OF SAID SOUTHWEST QUARTER (SW/4); THENCE NORTH ON THE WEST LINE A DISTANCE OF 225 FEET; THENCE EAST AND PARALLEL TO THE SOUTH SECTION LINE A DISTANCE OF 50 FEET; THENCE NORTH AND PARALLEL TO THE WEST SECTION LINE A DISTANCE OF 250 FEET; THENCE EAST AND PARALLEL WITH THE SOUTH SECTION LINE A DISTANCE OF 605.12 FEET; THENCE SOUTH AND PARALLEL WITH THE WEST SECTION LINE A DISTANCE OF 425 FEET; THENCE WEST AND PARALLEL WITH THE SOUTH SECTION LINE A DISTANCE OF 380.12 FEET; THENCE SOUTH AND PARALLEL WITH THE WEST SECTION LINE A DISTANCE OF 50 FEET TO A POINT ON THE SOUTH SECTION LINE; THENCE WEST ON SAID SOUTH SECTION LINE A DISTANCE OF 275 FEET TO THE POINT OF BEGINNING. LESS AND EXCEPT THAT PART AS DESCRIBED AS FOLLOWS: BEGINNING 50.00 FEET EAST OF

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AND 33.00 FEET NORTH OF THE SOUTHWEST CORNER OF SAID SOUTHWEST QUARTER (SW/4); THENCE EAST ALONG THE NORTH RIGHT-OF-WAY LINE OF RENO AVENUE A DISTANCE OF 225.00 FEET; THENCE NORTH A DISTANCE OF 17.00 FEET; THENCE SOUTH 89°49'16" WEST A DISTANCE OF 205.02 FEET; THENCE NORTH 45°12'48" WEST A DISTANCE OF 28.30 FEET TO A POINT ON THE EAST RIGHT-OF-WAY LINE OF EASTERN AVENUE; THENCE SOUTH ALONG SAID RIGHT-OF-WAY LINE A DISTANCE OF 37 FEET TO A POINT OF BEGINNING. AND LESS AND EXCEPT THAT PART DESCRIBED AS FOLLOWS: BEGINNING 445.82 FEET NORTH AND 50 FEET EAST OF THE SOUTHWEST CORNER OF THE SOUTHWEST QUARTER (SW/4); THENCE NORTH A DISTANCE OF 30 FEET; THENCE EAST A DISTANCE OF 30 FEET; THENCE IN A SOUTHWESTERLY DIRECTION A DISTANCE OF 42.77 FEET TO THE POINT OF BEGINNING; WHETHER ANY OF THE FOREGOING IS OWNED NOW OR ACQUIRED LATER; ALL ACCESSIONS, ADDITIONS, REPLACEMENTS, AND SUBSTITUTIONS RELATING TO ANY OF THE FOREGOING; ALL RECORDS OF ANY KIND RELATING TO ANY OF THE FOREGOING; ALL PROCEEDS RELATING TO ANY OF THE FOREGOING (INCLUDING INSURANCE, GENERAL INTANGIBLES AND ACCOUNTS PROCEEDS)

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EXHIBIT 1
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