

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: October 26, 2018 5:28 PM FILING ID: 299BB87B6B881 CASE NUMBER: 2018CV33011
Plaintiff: Gerald Rome, Securities Commissioner for the State of Colorado v. Defendants: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424
RECEIVER’S EXPEDITED MOTION FOR ORDER TO SHOW CAUSE AND REQUEST FOR FORTHWITH HEARING	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (collectively, “Dragul and the GDA Entities”), pursuant to C.R.C.P. 107(c), hereby requests that the Court enter an Order to Show Cause why Dynasty, LLC (“Lender”) and William Walt Pettit (“Pettit”) should not be held in contempt of Court for violating this Court’s August 30, 2018, Receivership Order.

I. Background of dispute and conferral pursuant to C.R.C.P. 121, § 1-15(8) and notice of motion requesting immediate attention pursuant to C.R.C.P. § 121 1-15(4).

1. This Court's August 30, 2018, Stipulated Order Appointing Receiver ("Receivership Order") enjoins all actions in equity or at law against the Receiver, Dragul, the GDA Entities, or the Receivership Estate, absent an order from this Court. Receivership Order ¶ 26, at 18.

2. Two Dragul related entities – Hickory Corners Box 16 A, LLC ("HCB 16 A") and Hickory Corners Box 16 B, LLC ("HCB 16 B") (jointly, "Borrowers") – executed a \$1.1 million promissory note to Lender on June 29, 2017, which was personally guaranteed by Dragul.

3. The loan is secured by a first mortgage lien on 1.733 acres of real property located in the Hickory Corners shopping center in Hickory, North Carolina (the "Property"). There is a 23,000 square foot partially-leased building on the Property. The Property is owned as tenants in common by HCB 16 A (64.59%) and HCB 16 B (35.41%). The Property is also encumbered by a March 13, 2018, second mortgage of \$500,000 in favor of WBF/CT Associates, LLC.

4. On October 12, 2018, counsel for the Receiver spoke with Pettit, who is Lender's North Carolina counsel. The Lender's representative was also on the call. Pettit claimed Borrowers were in default and now owe about \$1 million on the loan. **Exhibit 1** (Affidavit of Rachel A. Sternlieb), at ¶¶ 4- 5.

5. During the October 12th call, the Receiver's counsel informed Lender and Pettit that the Receivership Order enjoined the Lender from foreclosing its lien and spoke with them at length about the scope of the provisions in the Receivership Order that broadly defined what constituted assets of the Receivership Estate. Pettit acknowledged that he and his client had actual

knowledge of and a copy of the Receivership Order, but said that notwithstanding the Order, Lender intended to foreclose the Property. **Exhibit 1**, at ¶¶ 6 – 9.

6. On October 17, 2018, Pettit sent an email to the Receiver’s counsel (**Exhibit 2**) stating that, notwithstanding the Receivership Order, Lender was proceeding to foreclose, and that North Carolina’s analog to Colorado’s C.R.C.P. 120 hearing was scheduled for Thursday, November 15, 2018. *See also Exhibit 1*, at ¶ 12.

7. On October 19th, Pettit sent a Notice of Hearing on Foreclosure of Deed of Trust to the Receiver filed in Catawba County, North Carolina district court on October 18, 2018, which indicates the “Rule 120 hearing” had been advanced a week and **is now scheduled for Thursday, November 8, 2018. (Exhibit 3)**. *See also Exhibit 1*, at ¶ 13.

8. Despite the Receivers’ requests to stop the foreclosure, Lender and Pettit continue to pursue the North Carolina foreclosure in direct violation of this Court’s injunction.

9. Because the foreclosure hearing is scheduled for November 8, 2018, pursuant to C.R.C.P. 121-1-15(4), the Receiver requests that the Court set this motion for a forthwith hearing.

II. Lender and Pettit are violating this Court’s Receivership Order.

A. The Property is part of the Receivership Estate.

10. Lender and Pettit have taken the position that their North Carolina foreclosure action is not enjoined by the Receivership Order for three reasons. First, the Order does not specifically identify Borrowers (Hickory Corners Box 16 A, LLC and Hickory Corners Box 16 B, LLC) as entities over which Mr. Sender has been appointed Receiver. Second, although the Receivership Order does apply to “assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the

solicitation or sale of securities as described in the Complaint, or derived indirectly or indirectly from investor funds,” (Receivership Order ¶ 9 at 12), Lender and Pettit claim to be unaware of whether HCB 16 A or HCB 16 B obtained funds from investors. And third, because the Property is in North Carolina, this Court lacks jurisdiction to enjoin them from foreclosing. None of these arguments justifies Lender and Pettit’s disregard of this Court’s stay order, of which both had actual notice. *See Exhibit 2.*

11. Lender and Pettit’s first two arguments selectively quote paragraph 9 of the Receivership Order while ignoring the other operative language. Paragraph 9 defines the Receivership Estate to include Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC

and all of their assets, including, but not limited to, all real and personal property, including tangible and intangible assets, *their interests in any subsidiaries or related companies, management and control rights*, claims, and causes of action, wherever located, including without limitation the “LLC Entities” identified in the Commissioner’s Motion and Complaint for Injunctive and Other Relief, or assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the Complaint, or derived indirectly or indirectly from investor funds

Receivership Order ¶ 9, at 3 (italics added).

12. HCB 16 A was capitalized with investor money obtained from Hagshama Hickory Corners NC LLC, and Cofund 6, LLC, both Israeli investment funds. **Exhibit 4, Ex. A.** And as confirmed by a certification under oath provided to the Lender when the loan was funded, HCB 16 A is managed by Hickory Management, LLC. **Exhibit 5.**

13. In turn, Hickory Management, LLC is managed by GDA Real Estate Management, Inc. Dragul is the president of GDA Real Estate Management, Inc. **Exhibit 5**. HCB 16 A, which owns 64.59% of the Property, was funded with investor money and is managed by Dragul. **Exhibit 5**.

14. HCB 16 B, which owns the other 35.41% of the Property, is 100% owned by Dragul. The Property is part of the Receivership Estate because the Property's majority owner was capitalized with funds solicited from investors and is managed by Dragul, and because its minority owner is wholly-owned by Dragul. The Receiver's counsel explained to Lender and Pettit during the October 12th call that counsel was still investigating the complex multi-layer ownership structure of the Property.

B. The Stay imposed by this Court's Receivership Order applies to the Property.

15. The Receiver is an officer of this Court, which has jurisdiction over the Receivership Estate. *See, e.g., Midland Bank v. Galley Co.*, 971 P.2d 273, 276 (Colo. 1998). The order appointing a receiver is the measure of his power. *Id.* at 277. The Receivership Order appointed the Receiver over *all* of the real and personal property of Dragul, the GDA Entities, *and* their interests in any subsidiaries or related companies, management and control rights, *wherever located*. Receivership Order ¶ 9, at 3 (*italics added*). This Court vested the Receiver with authority to take charge of all "Receivership Property, *regardless of where such property is located*. *Id.* ¶13(c), at 7 (*italics added*).

16. Upon appointment of a receiver, all property in the possession of the entities placed into receivership passes into the custody of the receivership court and becomes subject to its authority and control. *E.g. Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372

(D. Colo. 1995). The receivership court has the power to enjoin actions or issue blanket stay orders of all proceedings against receivership property and such stays bind non-parties. *See id.* at 373.

17. A receiver's duties include protecting the property of the estate and ensuring that it is not improperly diminished during the pendency of the receivership. *E.g., S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). The purpose of a receivership litigation stay is clear. "A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant." *Id.* at 1198 (quoting *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005)). The facts and holding in *Vescor* are instructive.

18. In *Vescor*, a receiver was appointed by a Utah district court pursuant to a motion filed by the S.E.C. in the wake of a Ponzi scheme. *Vescor Capital Corp. v. Valle Verde L.P.*, No. 2:07-CV-363, 2009 WL 223532, at *1-2 (D. Utah Jan. 29, 2009). The receivership property included real estate in Las Vegas. Before the *Vescor* receiver was appointed, one of *Vescor*'s secured lenders had filed foreclosure actions in Nevada. Upon learning of the receivership – unlike Lender and Pettit here – the secured lender filed a motion to lift the receivership stay to proceed with its foreclosure. The district court denied the motion to lift the stay and the Tenth Circuit affirmed. *Vescor*, 599 F.3d at 1191.

19. The secured lender in *Vescor* argued it was entitled to pursue its foreclosure action notwithstanding the receivership because it was a secured creditor with a valid lien against the Nevada real property and thus, was entitled to priority over unsecured creditors with respect to that real estate. 599 F.3d at 1193. The *Vescor* receiver – while not disputing the validity of the lender's liens – argued that various transactions concerning the lender had not been properly accounted for,

that money from investors had been comingled in Vecor's accounts and used to pay various obligations, and that the receiver needed time to sort out the accounting irregularities. This is precisely the situation here. As alleged in the Commissioner's complaint in this case:

The funds held in the various [Dragul] LLC Entities were transferred, dissipated, diverted, and/or misappropriated by Dragul. These commingled investor funds were dispersed without regard for corporate formalities or distinctions. This scheme resulted in investors not having their funds held or invested when Dragul represented they would be held or invested. Dragul used the GDA account and the LLC Entities' accounts as if they were interchangeable. This commingling of funds was the mechanism created by Dragul as part of his scheme to defraud the investors. None of the investor funds transferred in or out of any particular LLC Entity can be identified substantially as an asset of any LLC Entity, and as a result, the investor funds have lost their identity and have become untraceable.

Complaint for Injunctive and Other Relief ¶ 24, at 7 (August 15, 2018).

20. This Court's Receivership Order sets forth the following priority for paying valid claims against the Estate: (1) administrative claims and post-Receivership taxes; (2) Receiver's certificates; (3) secured claims; (4) unsecured pre-Receivership tax claims; (5) unsecured creditors; and (6) equity interests.

21. The Receiver's forensic accountants are in the process of reviewing documents but have not yet begun to trace funds routinely transferred among the various Dragul entities. At one point, the Dragul Entities held over a hundred separate bank accounts and routinely comingled money among them. The amount of claims against the Receivership Estate is currently unknown, as is whether the assets of the Estate will be sufficient to pay its liabilities.

22. Upon information and belief, there is equity in the Hickory Corners Property, and the Receiver seeks to preserve that equity for the benefit of defrauded investors. Lender and Pettit,

on the other hand, seek to circumvent the process established by this Court for paying claims, including secured claims, in order to obtain preferential payment of the Lender's claim, and to reap the benefit of any equity in the Property. While it may be true here, as it was in *Vescor*, that "secured interest holders will generally receive preferential treatment under a receiver's final distribution plan, [] we are not yet at that stage of the proceedings." *Vescor*, 599 F.3d at 1195. The very reason for the litigation stay is to allow the Receiver time to evaluate and pay claims in an orderly fashion. Given what the Receiver believes may be an equity cushion in the Property, there is no compelling reason to allow Lender and Pettit to violate the Court's stay order to proceed with their foreclosure action.

WHEREFORE, the Receiver asks the Court to set a forthwith hearing and to enter an Order to Show Cause why Lender and Pettit should not be held in contempt for violating the stay imposed by this Court's Receivership Order.

Dated: October 26, 2018.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I served a true and correct copy of the foregoing **RECEIVER'S EXPEDITED MOTION FOR ORDER TO SHOW CAUSE AND REQUEST FOR HEARING** via CCE and/or *via* electronic mail to the following:

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