

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO

Denver District Court
1437 Bannock St.
Denver, CO 80202

Plaintiff: Chris Myklebust, Securities Commissioner for the State of Colorado

v.

Defendants: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC

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Case Number: 2018CV33011

Division/Courtroom: 424

**AFF II DENVER, LLC'S MOTION FOR RECONSIDERATION OF,
OR, ALTERNATIVELY, RELIEF FROM, THIS COURT'S
ORDER APPROVING WINNING AND BACKUP CONTRACTS
FOR SALE OF HAPPY CANYON SHOPPES**

AFF II Denver, LLC (“Ardent” or the “Lender”), by and through its undersigned counsel, hereby files this Motion for Reconsideration of, or, Alternatively, Relief From, this Court’s Order Approving Winning and Backup Contracts for Sale of Happy Canyon Shoppes (the “Motion”) and respectfully states as follows:

RELEVANT BACKGROUND

1. On August 30, 2018, the Court appointed Harvey Sender as the receiver (“Receiver”) for Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and their respective properties and assets (collectively, the “Receivership Estate”). (Receivership Order, ¶¶ 5, 9).

2. On January 16, 2019, the Receiver filed his Motion for Order Authorizing Sale of Happy Canyon Shoppes (the “Sale Motion”). Ardent objected to the Sale Motion on the basis that it held a first priority mortgage against Happy Canyon Shoppes and the proposed sale would not pay Ardent in full, in cash (“Ardent’s Sale Objection”). As a result, Ardent was not willing to release its mortgage against Happy Canyon Shoppes unless it was paid in full. Ardent is owed in excess of \$25 million.

3. On February 13, 2019, the Court entered an Order Approving Happy Canyon Shoppes Auction Procedures (the “Auction Procedures Order”). The Auction Procedures Order did not adjudicate Ardent’s Sale Objection and such objections were preserved.

4. In accordance with the Auction Procedures Order, on February 22, 2019, the Receiver conducted an auction of the Happy Canyon Shoppes. The Receiver selected BPI, Inc. as the winning bidder at a price of \$24.2 million. Ardent again informed the Receiver and BPI, Inc. that it would not release its mortgage against Happy Canyon Shoppes absent payment in full.

5. Subsequent to the auction, the Receiver, BPI, Inc., the winning bidder, and Ardent engaged in discussions to resolve Ardent's outstanding objections to the sale of Happy Canyon Shoppes. As a result of these discussions, the Receiver, BPI, Inc. and Ardent reached the following agreement (collectively, the "Settlement Agreement"):

- a. The Receiver agreed to pay Ardent \$20,060,791 from the proceeds of the sale of Happy Canyon Shoppes ("Happy Canyon Sale Proceeds");
- b. BPI, Inc. agreed to buy Ardent's note against the Marketplace/Box property (the "Note Sale"), another property that is part of the Receivership Estate, for \$5,000,000 ("Additional Proceeds");
- c. Upon receipt of \$25,060,791 (consisting of the Happy Canyon Sale Proceeds and the Additional Proceeds), Ardent agreed that it would (i) release its mortgage against Happy Canyon Shoppes to allow for the sale of such property free and clear to BPI, Inc., (ii) assign its note and related documents against the Marketplace/Box Property to BPI, Inc. and (iii) withdraw any objections to the sale of Happy Canyon Shoppes.

6. On February 25, 2019, the Receiver filed the Receiver's Report of Auction and Request for Approval of Winning and Backup Contracts for the Happy Canyon Shoppes (the "Auction Report").

7. One day later, on February 26, 2019, this Court entered the Order Approving Winning and Backup Contracts for Sale of Happy Canyon Shoppes (the "Sale Order").

8. Ardent has no record of being served a copy of the Auction Report. Ardent was not aware that the Sale Order was entered until being informed today, March 12, 2019, by BPI, Inc. that such Sale Order was entered.

9. The Sale Order does not reflect the terms of the Settlement Agreement. Instead, pursuant to the Sale Order that was submitted by the Receiver, Ardent is to receive \$18,907,140.33 from the sale of the Happy Canyon Shoppes, which amount was not agreed to by Ardent and which payment will not obligate Ardent to release its mortgage against the Happy Canyon Shoppes.

RELIEF REQUESTED

10. By this Motion, Ardent respectfully requests that this Court reconsider the entry of the Sale Order, or alternatively, clarify, amend or otherwise provide relief from the Sale Order to Ardent so that the Settlement Agreement is incorporated into such Sale Order.

11. Ardent has no record of receiving notice of the Auction Report or the Sale Order. Ardent was made aware of the entry of the Sale Order by BPI's counsel today.

12. Moreover, Ardent had not taken any further action in this Court to prevent the sale of the Happy Canyon Shoppes in reliance upon the Receiver's agreement to the terms of the Settlement Agreement. Over the past several days, in further reliance on the Receiver's agreement to the Settlement Agreement, Ardent has been working diligently to finalize the terms of the Note Sale to BPI, Inc.

13. As a result, Ardent was surprised to learn that the Receiver had submitted the Sale Order that makes no reference to the Settlement Agreement and arbitrarily modifies the amount to be paid to Ardent. Ardent had been proceeding in good faith to assist the Receiver in facilitating the sale of the Happy Canyon Shoppes to BPI, Inc. by accepting less than full payment of its

secured indebtedness and ensuring that the Receivership Estate is left with a significant amount of monies to fund expenses of administration and to pay off another alleged secured creditor who claims an interest in Happy Canyon Shoppes.

14. Ardent is willing to proceed with the Settlement Agreement and upon receipt of \$25,060,791 (consisting of the Happy Canyon Sale Proceeds and the Additional Proceeds), Ardent will release its mortgage against Happy Canyon Shoppes. Absent payment of such amount, Ardent will not release its mortgage against Happy Canyon Shoppes unless the Receiver pays Ardent in full in cash any and all amounts due and owing under the mortgage, which amount is in excess of \$25,060,791.

15. There is no rule or statute that establishes a party's right to file a motion for reconsideration. *Stone v. People*, 895 P.2d 1154, 1155-56 (Colo.App. 1995). The Court may, however, treat a motion to reconsider as a motion under Colorado Rule of Civil Procedure ("C.R.C.P.") 59. *See also Catlin v. Tormey Bewley Corp.*, 219 P.3d 407 (Colo. App. 2009) ("Reconsideration motions, although discouraged, can be treated under C.R.C.P. 59"). C.R.C.P. 59 provides that post-trial motions shall be filed "[w]ithin 14 days of entry of judgment ... or such greater time as the court may allow." In accordance with C.R.C.P. 59, Ardent has served this Motion on March 12, 2019 (the first day on which it became aware of entry of the Sale Order) and will promptly file such Motion with the Court on March 13, 2019.

16. Alternatively, Ardent seeks relief under C.R.C.P. 60(b). Rule 60(a) addresses relief due to mistake, inadvertence, surprise, excusable neglect or fraud. C.R.C.P. 60(b) provides as follows:

(b) Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than 182 days after the judgment, order, or proceeding was entered or taken...

17. For all of the reasons set forth herein, Ardent submits that reconsideration nor relief from the Sale Order is appropriate under C.R.C.P. 59 or 60(b). Ardent was proceeding in good faith and in reliance on the Receiver's agreement to the Settlement Agreement. Without notice to Ardent and without Ardent's knowledge, the Receiver sought entry of the Sale Order that does not reflect the terms of the Settlement Agreement and denied Ardent due process in terms of proceeding with its pending objections to the sale of Happy Canyon Shoppes.

WHEREFORE, for the reasons set forth herein, Ardent respectfully requests that this Court enter an order (a) clarifying the Sale Order so that it reflects the terms of the Settlement Agreement, or, alternatively, vacating the Sale Order to allow Ardent to proceed with its pending objections to the sale of Happy Canyon Shoppes and (b) granting such other relief as deemed appropriate.

Dated: March 12, 2019

Respectfully submitted,

GREENBERG TRAURIG, LLP

s/ Jeffrey M. Lippa

Jeffrey M. Lippa, # 36835

Attorneys for AFF II Denver, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2019, a true and accurate copy of the foregoing **AFF II DENVER, LLC'S MOTION FOR RECONSIDERATION OF, OR, ALTERNATIVELY, RELIEF FROM, THIS COURT'S ORDER APPROVING WINNING AND BACKUP CONTRACTS FOR SALE OF HAPPY CANYON SHOPPES** was served via E-Mail on the following parties:

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*(Original on file at offices of Greenberg Traurig,
LLP, pursuant to C.R.C.P. 121, § 1-26)*