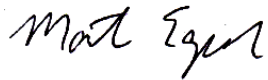


DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al. v. Defendant(s) GARY DRAGUL et al.	DATE FILED: April 8, 2019 9:03 AM CASE NUMBER: 2018CV33011
	△ COURT USE ONLY △
	Case Number: 2018CV33011 Division: 424 Courtroom:
Order: Receiver's Motion for Order Authorizing Sale of Hickory Corners w/attach	

The motion/proposed order attached hereto: GRANTED.

Issue Date: 4/8/2019



MARTIN FOSTER EGELHOFF
District Court Judge

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: Chris Mykelbust, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendant: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC</p>	
<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</p>	<p>Case Number: 2018CV33011 Division/Courtroom: 424</p>
<p style="text-align: center;">RECEIVER’S MOTION FOR ORDER AUTHORIZING SALE OF HICKORY CORNERS</p>	

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”), asks the Court to enter an order approving the sale of real property known as the Hickory Corners shopping

center to Nova Capital Partners, LLC for \$13,600,000 pursuant to the Purchase and Sale Agreement submitted as **Exhibit 1** with this motion (the “Nova PSA”).

I. The Receivership Order gives the Receiver the authority to sell Hickory Corners.

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the “Commissioner”), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities.

2. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to COLO. REV. STAT. § 11-51-602(1), C.R.C.P. 66.

3. On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the “Receivership Order”), appointing Harvey Sender of Sender & Smiley, LLC as receiver for Dragul and the GDA Entities, and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order at 2, ¶ 5.

4. The Receivership Order grants the Receiver the authority to sell or otherwise dispose of Estate property and obtain Court approval for any sale for greater than \$10,000 (Receivership Order at 12, ¶ 13(t)).

5. Pursuant to paragraph 10 of the Receivership Order, Court approval of any motion filed by the Receiver shall be given as a matter of course within 10 days after the motion is filed and served. As reflected by the certificate of service below,

this Motion is being served on all parties who have appeared in this case and on all interested parties.

II. Hickory Corners: ownership, management, debt

6. Hickory Corners is a retail shopping center located at 1718-1842 Highway 70 Shoppes Entities, Hickory, North Carolina. Hickory Corners consists of two separate but adjacent parcels both owned by Dragul related entities.

A. The Shops

7. The first parcel is a strip mall (the “Shops”). It was purchased for \$12,740,000 on January 27, 2017, by Hickory Corners 16 A, LLC (“Corners 16A”) and Hickory Corners 16B, LLC (“Corners 16B”), which own the property as tenants-in-common, 64.59% and 35.41%, respectively. The Shops was purchased using funds from (1) a \$9.3 million loan from Rialto Mortgage Finance, LLC (“Rialto”), (2) \$2,964,403.00 provided by Hagshama Hickory NC, LLC (“Hagshama Hickory”), (3) \$1,236,447.00 provided by CoFund 6, LLC (“CoFund 6”),¹ and (4) an additional \$170,000 was provided for earnest money and good faith deposits by “Dragul/others.”

8. **Corners 16A.** Corners 16A, an SPE, is owned by Hagshama Hickory (70.57%) and CoFund 6 (29.43%). It is managed by Hickory Management, LLC, whose sole member is Gary J. Dragul. Hickory Management, LLC is managed by GDA Real Estate Management, Inc., whose president and sole owner is also Gary J. Dragul (collectively, the “Manager”).

¹ Hagshama Hickory and CoFund 6 jointly contributed \$4,200,850.

9. **Corners 16B**. The members of Corners 16B, also a SPE, are two other SPE's – GDA Hickory 17, LLC (50.10%) and GDA Hickory Investors, LLC (49.90%). Based on information provided to the Receiver, the members of GDA Hickory 17, LLC are believed to own Gary J. Dragul (50.69%) and eight individual investors who collectively own the remaining 49.31%. The ownership of GDA Hickory Investors, LLC is unclear: Dragul has represented to the Receiver that he holds 100% of the membership interests; on January 28, 2019, Alan C. Fox filed a claim against the Estate asserting that he owns 100% of the Class B membership units. Corners 16B is also managed by Hickory Management, LLC.

10. Upon information and belief, the Shops is approximately 97% leased. It is encumbered by a deed of trust securing a \$9.3 million loan made to Shops 16A and Shops 16B by Rialto Mortgage Finance, LLC, which Rialto declared in default in April 2018. Before the Receiver was appointed, Rialto began to sweep the rents from the property and to apply them to its loan. The payoff demand on the Rialto loan as of February 1, 2019, is \$8,075,886.92 (this amount excludes a prepayment penalty of \$1,667,413.60). The proposed Nova PSA, contemplates NOVA assuming the Rialto loan and avoiding this \$1.6 million penalty.

B. The Box

11. The second parcel to be sold to Nova is a standalone "Box" adjacent to the Shops. The Box is owned as tenants-in-common by Hickory Corners Box 16 A, LLC ("Box 16A") (64.59%) (and Hickory Corners Box 16 B, LLC ("Box 16B") (35.41%).

The Box was purchased on January 27, 2017 for \$1,760,000. It was funded initially with a 90-day \$1 million loan from Investors Title Exchange Corporation, which was later taken out by a June 29, 2017, \$1.1 million loan from Dynasty, LLC, and from additional funds deposited by Hagshama Hickory, CoFund 6, GDA, and hold back funding from the purchase of the Shops.

12. **Box 16A**. Box 16A is owned by same entities that own Shops 16A and in the same percentages. Box 16A is also managed by Hickory Management, LLC, whose sole member is Gary J. Dragul. Hickory Management, LLC is managed by GDA Real Estate Management, Inc., whose president and sole owner is also Gary J. Dragul.

13. **Box 16B**. Box 16B is owned by same Dragul related entities and investors, and in the same respective percentages as Shops 16B. It is also managed by Hickory Management, LLC.

14. At present, the Box is approximately 50% occupied by a single tenant, Guitar Center. On or about August 24, 2018, Guitar Center declared Box 16A, the landlord, in default of a March 1, 2016 lease agreement. Guitar Center commenced self-help remedies and has withheld rent since then to make repairs and tenant improvements the landlord was required to complete. Since the Receiver's appointment, the Estate has not received rent from the Guitar Center.

15. The Box is encumbered by a deed of trust securing a \$1.1 million loan made to Box 16A and Box 16B by Dynasty, LLC on June 29, 2017 (the "Dynasty

Loan”). On or about August 25, 2018, before the Receiver was appointed, Dynasty declared its Loan in default and after the Receiver was appointed Dynasty commenced foreclosure proceedings in North Carolina against the Box. As of October 2018, Dynasty asserted it was owed was \$1,052,365.23, which included legal and late fees. Since it declared its Loan in default, Dynasty has been assessing penalties of approximately \$600 per day.

16. The Hickory Corners property is encumbered by first mortgages of approximately \$9.1 million (disregarding Rialto’s prepayment penalty). On March 13, 2018, Gary Dragul personally borrowed \$500,000 from WBF/CT Associates, LLC and as manager of Box 16A and Box 16B granted WBF/CT a second deed of trust on the Box. It does not appear Box 16A and Box 16B received any value in exchange for that second deed of trust, which may be avoidable under COLO. REV. STAT. § 38-8-105. There is also mechanic’s lien claimant, National Commercial Builders, Inc. which on September 21, 2018 – in violation of the stay imposed by this Court’s Receivership Order – recorded a mechanics’ lien against the Shops for \$586,054.67. Ostensibly there are therefore liens of nearly \$10.2 million against the Hickory Corners property.

III. Sale of Hickory Corners is in the best interests of the Estate and its creditors.

17. There exists little Colorado authority with respect to factors the Court should consider regarding whether to approve a Receiver’s proposed sale. In analogous bankruptcy contexts, approval of a sale of property pursuant to Section

363 of the Bankruptcy Code is warranted where there exists a “sound business reason.” *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). “In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a ‘business judgment test.’” *Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999).

18. Factors bearing on whether a sound business reason or purpose supports a proposed sale of estate property include (where applicable): (1) the proportionate value of the asset to the estate as a whole; (2) the amount of elapsed time since the filing; (3) the likelihood that a plan of reorganization will be proposed and confirmed in the near future; (4) the effect of the proposed disposition on the future plans of reorganization; (5) the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property; (6) which of the alternatives of use, sale or lease the proposal envisions; and (7) most importantly perhaps, whether the asset is increasing or decreasing in value. *In re Medical Software Solutions*, 286 B.R. 431, 441 (Bankr. D. Utah 2002) (quoting *Lionel*, 722 F.2d at 1071) (emphasis omitted). Bankruptcy courts are granted considerable discretion in evaluating proposed sales. *Montgomery Ward*, 242 B.R. at 153; see *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 168 (B.A.P. 9th Cir. 2001) (recognizing that “[r]ulings on motions to sell property of

the estate other than in the ordinary course of business pursuant to section 363 are reviewed for abuse of discretion”).

19. In the Receiver’s judgment, the proposed sale of Hickory Corners is in the best interest of the Estate and its creditors. The Receiver has hired the nationally-recognized firm of Marcus & Millichap to market the Property and has negotiated with the Buyer. Closing under the Nova PSA is to occur within 45 days of the date the PSA was executed, or on or before March 22, 2019.

20. Presently, the loans secured by the Hickory Corners property are in default and the Estate lacks cash flow to service them. The Receiver has been using funds from other sources to fund critical expenses for the property.

21. Buyer has acknowledged that Hickory Corners the proposed transaction is subject to a Master Agreement the Receiver executed on February 5, 2019, with Odyssey Acquisitions III, LLC and Hagshama which may result in Odyssey purchasing the Estate’s interest in the entities that own the Hickory Corners property, which would thereby supersede this agreement. If the Nova PSA closes, it is presently uncertain what if any cash the Estate will receive from the proposed sale. A commission of 2.25% (\$306,000) will be due at closing, which would reduce the sales proceeds to \$13,294,000. First mortgage liens against the property are estimated to be \$9.1 million. After paying those and additional closing costs, unpaid taxes, and other claims, the net proceeds from the sale may be somewhere around \$3.9 million. If the WBF/CT \$500,000 lien is valid and paid, that would leave about \$3.4 million.

If the National Commercial Builders lien is valid (which the Receiver disputes) and paid at closing, there would be approximately \$2.8 million in net proceeds. If the net sales proceeds are distributed in accordance with applicable tenants-in-common and operating agreements, Hagshama and CoFund would receive approximately \$1,800,000, and other investors approximately \$240,000. Pending additional analysis and reconciliation, the Estate would receive approximately \$740,000 from the purported Dragul interest in the property. The Receiver has not yet determined whether the tenants-in-common and operating agreements are valid and enforceable or whether the net proceeds should be distributed in accordance with their terms. Alternatively, equity may best be served by disregarding these agreements and retaining the net proceeds in the Estate for distribution to all creditors.

22. Regardless of how the net proceeds from the proposed sale are distributed, the proposed sale is in the best interest of the Estate because absent a timely sale the Hickory Corners property will be lost to foreclosure and the Estate may receive nothing.

WHEREFORE, the Receiver asks the Court to grant this Motion, approve the proposed sale of Hickory Corners in accordance with the terms of the Nova PSA, and authorize the Receiver to take any and all further actions necessary to consummate the sale.

Dated: February 8, 2019.

ALLEN VELLONE WOLF HELFRICH & FACTOR
P.C.

By: /s/ Michael T. Gilbert

Patrick D. Vellone

Michael T. Gilbert

Rachel A. Sternlieb

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ATTORNEYS FOR THE RECEIVER

Attachment to Order 2018 CV 33011

CERTIFICATE OF SERVICE

I certify that on February 8, 2019, I served a true and correct copy of the foregoing **RECEIVER'S MOTION FOR ORDER AUTHORIZING SALE OF HICKORY CORNERS** via CCE to the following:

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By: /s/ Rachel A. Sternlieb _____

CERTIFICATION OF E-SERVICE ON CLAIMANTS

A copy of the Motion will be sent out by electronic mail in accordance with the Court's Order regarding same, on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

By: /s/ Terri M. Novoa
Allen Vellone Wolf Helfrich & Factor P.C.

Attachment to Order - 2018CV33341