

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock Street Denver, CO 80202</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 style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for WBF/CT Associates, LLC: SHAPIRO BIEGING BARBER OTTESON LLP Duncan E. Barber, Atty. Reg. No. 16768 7979 E. Tufts Avenue, Suite 1600 Denver, CO 80237 (720) 488-0220 Email: dbarber@sbbolaw.com Phone Number: (720) 488-0220</p>	<p>Case Number: 2018CV33011 Division/Courtroom: 424</p>
<p style="text-align: center;">Motion for Leave to File Suit to Establish Validity of North Carolina Lien</p>	

WBF/CT Associates, LLC (“WBF/CT”) by and through counsel, hereby seeks relief from the stay of proceedings in this receivership action to file a lawsuit in Catawba County, North Carolina, to establish the validity of its lien on the property commonly referred to as the “Hickory Corners Box,” located in Catawba County, North Carolina.

In support of this Motion, WBF/CT states the following:

1. On August 30, 2018, this Court entered a Stipulated Order Appointing Receiver and created the Receivership Estate over “all real and personal property” of Gary Dragul and certain related entities, including GDA Real Estate Management, Inc. (“GDAREM”). Order Appointing Receiver (the “OAR”), p. 3, ¶ 9.

2. The Receivership Estate’s real property includes a retail shopping center located at 1718-1842 Highway 70 Shoppes Entities, Hickory, North Carolina (“Hickory Corners Box”).¹

3. The Receiver sought leave of this Court to sell Hickory Corners Box pursuant to the Receiver’s Motion for Order Authorizing Sale of Hickory Corners (the “Sale Motion”) and the Court granted that request on April 8, 2019.

4. The holder of the first Deed of Trust on the Hickory Corners Box has initiated foreclosure proceedings in Catawba County, North Carolina under North Carolina foreclosure law pursuant to an apparent agreement/understanding with the Receiver.² The foreclosure sale is currently scheduled for August, 2019.

5. WBF/CT holds a Second Deed of Trust and Security Agreement, Assignment of Leases and Rents (the “Deed of Trust”) on Hickory Corners Box. Box 16A and Box 16B granted the Deed of Trust to WBF/CT in exchange for a \$500,000 loan from WBF/CT for improvements to the Hickory Corners Box. Gary Dragul signed a Promissory Note evidencing the \$500,000 loan in his personal capacity to secure the loan. The Deed of Trust and Promissory Note were executed on March 13, 2018. WGF/CT then wired \$495,000 to GDA Hickory 17,

¹ The record owners of Hickory Corners Box are Delaware entities called Hickory Corners Box 16A, LLC (“Box 16A”), and Hickory Corners Box 16B, LLC (Box 16B”). Gary Dragul/his entities manage Box 16A pursuant to an agreement with GDA Real Estate Management, Inc. (“GDAREM”), and hold an ownership interest in Box 16B.

² Upon information and belief, the Receiver is aware of the North Carolina foreclosure action and has not objected to the sale in North Carolina or requested an Order to Show Cause in this Court why such sale is not in violation of the OAR pursuant to paragraph 26, p. 18.

LLC on March 13, 2018 (GDA Hickory 17, LLC is one of the Dragul-related owners of Box 16B). The Deed of Trust was recorded in the real property records of Catawba County, North Carolina, on April 30, 2018.

6. The Receiver acknowledges WBF/CT's Deed of Trust, *see* Sale Motion, ¶ 16, p. 6, and it is undisputed that WBF/CT provided \$500,000.00 (for what Dragul represented was for real property improvements to Hickory Corners Box). However, the Receiver apparently contests the validity and enforceability of WBF/CT's Deed of Trust. *Id.* Nonetheless, the Receiver did not negotiate with or make provision for WBF/CT's Deed of Trust in the Sale Motion or thereafter.

7. Given the upcoming North Carolina foreclosure sale, WBF/CT's Deed of Trust rights are at significant risk. Accordingly, WBF/CT intends to bid at the August 2019 foreclosure sale to protect the value of its Deed of Trust and that bid likely will generate a surplus over the amount owed on the first deed of trust.

8. Upon information and belief, the Receiver will claim that he is entitled to any surplus in contravention of WBF/CT's rights in the Deed of Trust.

9. In the event of a dispute over surplus foreclosure sale proceeds, North Carolina statute requires that any such funds be paid to the Clerk of Court of Catawba County, North Carolina clerk of court. *See* N.C. Gen. Stat. §§ 45-31(b)(3) and (b)(4) (litigation over surplus foreclosure sale proceeds must be brought in North Carolina to ensure *in rem* personal jurisdiction over all potential claimants to the surplus *res.*). Thus, it appears inevitable that there will be a North Carolina-based dispute over the likely surplus arising from the upcoming North Carolina foreclosure sale.

CERTIFICATE OF SERVICE

I certify that on July 1, 2019, a true and correct copy of the foregoing Motion for Leave to File Suite to Establish Validity of North Carolina Lien was efiled and served via the Court's E-Filing System and additionally served via US Mail, first-class, postage prepaid to the following:

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/s/ Mary Anne Lenzi

NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CvS ____

WBF/CT ASSOCIATES, LLC,)
)
Plaintiff,)
)
v.)
)
HARVEY SENDER, AS RECEIVER)
FOR GARY J. DRAGUL, GDA REAL)
ESTATE SERVICES, LLC, GDA REAL)
ESTATE MANAGEMENT, LLC, AND)
THEIR RESPECTIVE PROPERTIES)
AND ASSETS; HICKORY CORNERS)
BOX 16A, LLC; AND HICKORY)
CORNERS BOX 16B, LLC;)
)
Defendant.)

COMPLAINT

WBF/CT Associates, LLC (“WBF/CT”) by and through counsel, hereby submits this Complaint against Harvey Sender, as Receiver for Gary J. Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and their respective Properties and Assets (the “Receiver”); Hickory Corners Box 16A, LLC; and Hickory Corners Box 16B, LLC to obtain a declaration that WBF/CT’s lien on the property described below is valid, enforceable, and non-avoidable.

PARTIES

1. WBF/CT is a Pennsylvania limited liability company. WBF/CT holds a Second Deed of Trust and Security Agreement, Assignment of Leases and Rents (the “Deed of Trust”) on property in Hickory, North Carolina that is commonly referred to as the “Hickory Corners Box.”

2. Box 16A is a Delaware limited liability company.

3. Box 16B is a Delaware limited liability company. Box 16A and Box 16B jointly own the Hickory Corners Box.

4. The Receiver has been appointed as receiver for Gary J. Dragul and the various real estate companies owned by Dragul. The Receiver manages Box 16A and Box 16B.

FACTUAL BACKGROUND

5. WBF/CT holds the Deed of Trust on the Hickory Corners Box.

6. Box 16A and Box 16B granted the Deed of Trust to WBF/CT in exchange for a \$500,000 loan from WBF/CT for improvements to the Hickory Corners Box. Gary Dragul signed a Promissory Note evidencing the \$500,000 loan in his personal capacity to secure the loan.

7. The Deed of Trust and Promissory Note were executed on March 13, 2018. WGF/CT then wired \$495,000 to GDA Hickory 17, LLC on March 13, 2018. GDA Hickory 17, LLC is an owner of Box 16B.

8. The Deed of Trust was filed on April 30, 2018.

9. The Receiver now claims that the Deed of Trust is avoidable as a fraudulent transfer.

I. THE DEED OF TRUST IS NOT CONSTRUCTIVELY FRAUDULENT

10. The Deed of Trust is not avoidable as a constructively fraudulent transfer under either COLO. REV. STAT. § 38-8-105; N.C. GEN. STAT. § 39-23.4.¹

¹ The Receiver contends that Colorado law applies. The Receiver is wrong. That said, Plaintiff cites to both Colorado and North Carolina laws because the laws of both states are analogous.

11. Box 16A and Box 16B received reasonably equivalent value in exchange for the Deed of Trust. Specifically, the entities received the proceeds of the loan for the purpose of funding improvements to the Hickory Corners Box, Box 16A's and Box 16B's property.

12. Moreover, the Deed of Trust did not leave Box 16A or Box 16B with insufficient assets. To the contrary, as the Receiver's own filings in the receivership action have disclosed, the value of the Hickory Corners Box exceeds the existing debts secured by the property.

13. The Deed of Trust is not avoidable as a constructively fraudulent transfer because (1) Box 16A and Box 16B received reasonably equivalent value for the Deed of Trust and (2) Box 16A and Box 16B were not left insolvent as a result of the transfer.

II. THE DEED OF TRUST IS NOT ACTUALLY FRAUDULENT

14. The Receiver has also claimed that the Deed of Trust was provided with an actual intent to defraud creditors in violation of N.C. Gen. Stat. § 39-23.4(b) and Colo Rev. Stat. § 38-8-105(2). The Receiver's allegations are false.

15. As explained above, WBF/CT, in good faith, actually lent \$500,000 to fund improvements to the Hickory Corners Box. A condition for the funding of the loan was the Deed of Trust. Indeed, any lender would have requested such collateral for a loan of this size.

16. The factors for actual fraud are not present here. Among other things, WBF/CT was not an "insider"; the Deed of Trust was not "concealed" (in fact, it was

recorded into public record); the Deed of Trust did not constitute all or substantially all of Box 16A and Box 16B's assets, nor have Box 16A and Box 16B become insolvent; Box 16A and Box 16B did not abscond; and, as detailed above, Box 16A and Box 16B received reasonably equivalent value in exchange for the Deed of Trust.

17. The Deed of Trust is not avoidable as a transfer made with the intent to defraud creditors.

III. OTHER DEFENSES

18. WBF/CT explicitly reserves the right to assert other defenses that are or may become applicable in defending its Deed of Trust against the Receiver's allegations, including but not limited to the defenses set forth in N.C. GEN. STAT. §§ 39-23.8 and COLO. REV. STAT. § 38-8-109.

19. For example, WBF/CT is "a good-faith transferee" and the transfer was made "pursuant to a good-faith effort to rehabilitate" the Box entities, and "the transfer secured present value given for that purpose." N.C. GEN. STAT. §§ 39-23.8(d), (f); COLO. REV. STAT. § 38-8-109(4), (6).

20. Likewise, a lien is only avoidable if necessary to pay the debts of a creditor. No such creditor exists because Box 16A and Box 16B are not insolvent.

FIRST CAUSE OF ACTION (Declaratory Judgment)

21. WBF/CT incorporates the allegations contained in the preceding paragraphs.

22. A judiciable controversy under the Declaratory Judgment Act exists between the Plaintiff and the Defendants concerning the validity and enforceability of the Deed of Trust.

23. WBF/CT is entitled to a judgment declaring the Deed of Trust is valid, enforceable, and non-avoidable.

Wherefore, WBF/CT respectfully prays that Court enter a judgment:

1. Declaring that the Deed of Trust is valid, enforceable, and non-avoidable;
2. Taxing the costs of this action against Defendants; and
3. Granting such other and further relief as the Court deems just and proper.

This the ___th day of June 2019.

Clint S. Morse
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