

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock St. Denver, CO 80202 (720) 865-8612	DATE FILED: March 17, 2020 11:34 PM FILING ID: 2CB6D9C921493 CASE NUMBER: 2018CV33011
Plaintiff: David S. Cheval, Acting 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 Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424
DEFENDANT GARY DRAGUL’S MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER AND ORDERS AUTHORIZING ABANDONMENT AND FOR EXPEDITED BRIEFING SCHEDULE	

Defendant Gary Dragul, through counsel Jones & Keller, moves for an order from this Court clarifying certain aspects of the order appointing a receiver in this action, and the four orders granting the Receiver authorization to abandon certain property of the receivership estate. In support of this motion (“Motion”), Mr. Dragul states as follows:

CERTIFICATE OF CONFERRAL

Counsel for the Colorado Securities Commissioner takes no position regarding the relief requested in this Motion. On March 12, 2020, counsel for Mr. Dragul sent Receiver’s counsel a

draft of this Motion and called the Receiver's counsel to meet and confer regarding the same. Due to ongoing foreclosure actions potentially affected by this Motion, counsel for Mr. Dragul requested that Receiver's counsel promptly provide a position. Undersigned counsel and the Receiver's counsel exchanged voice mail messages and emails on March 13-15, and had another phone call on March 17, 2020. The Receiver opposes shortening the briefing schedule. However, the Receiver's counsel could not provide a position on the rest of the relief sought because he wished to research applicable authority first, and childcare issues resulting from the spread of the COVID-19 virus were preventing him from doing so, though he expressed that he hopes to provide his position on or about March 18th. Based on the foregoing, Mr. Dragul assumes the Receiver opposes the Motion, though he may ultimately decide not to oppose after researching.

BACKGROUND

1. On August 15, 2018, the Commissioner for the Colorado Division of Securities ("Division") filed a complaint for injunctive and other relief against Mr. Dragul, GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") commencing Case Number 2018CV33011 ("Commissioner's Complaint").

2. On August 30, 2018, the Court entered an order appointing Mr. Sender as receiver ("Receiver") for Mr. Dragul, GDARES, and GDAREM ("Receivership Order"), which provides that "[i]n the Receiver's discretion as appropriate, [the Receiver may] consider the potential sale of assets of Dragul, GARDES, and GARDEM to a third-party or to sell or otherwise dispose of any personal property of the Receivership Estate . . ." (Receivership Order, ¶ 13(t).)

3. On November 28, 2018, the Receiver filed a motion requesting authorization to abandon the Receivership Estate's interest in two single purposes entities, YM Retail 07 A, LLC and Safeway Marketplace Manager 07, Inc., which own and operate real property located at 6460 E. Yale Avenue, Units E & G in Denver, Colorado ("YM Motion"). On December 13, 2018, the Court entered an order granting the YM Motion.¹

4. On October 11, 2019, the Receiver filed a motion requesting authorization to abandon fifteen residential properties in the Receivership Estates ("Residential Motion"). The Court granted the Residential Motion on November 4, 2019.

5. On February 19, 2020, the Receiver filed a motion requesting authorization to abandon the Receivership Estate's interest in Clearwater Collection 15, LLC and Clearwater Plainfield 15, LLC, which are tenants-in-common and own a retail shopping center at 21688-21800 US Highway 19N in Clearwater, Florida ("Clearwater Motion"). On March 3, 2020, the Court entered an order granting the Clearwater Motion.

6. On February 21, 2020, the Receiver filed a motion requesting authorization to abandon the Receivership Estate's interest in 2166, 2176, 2186, and 2196 South Ash Street and 2175 and 2195 South Bellaire Street, both in Denver, Colorado ("Ash & Bellaire Motion"). The Court granted the Ash & Bellaire Motion on March 4, 2020.²

¹ After being abandoned by the Receiver in this case, the YM properties were placed into a separate receivership in an action brought by the Colorado Department of Public Health and Environment to facilitate environmental remediation of the properties. Despite those unique circumstances, this Motion seeks clarification that, as detailed below, any profits derived from the ultimate sale of the properties after the separate receivership is closed will be retained by the entity to which title reverted after the abandonment, which is YM Retail 07 A, LLC.

² The four orders authorizing the Receiver to abandon certain property of the Receivership Estate collectively are referred to throughout this Motion as the "Abandonment Orders".

ARGUMENT

The Receiver here takes the position that, under the authority in Paragraph 13(t) of the Receivership Order and applicable bankruptcy law, he may abandon properties yet retain an interest in, and management and control rights over, the single purpose LLCs that own those properties. The Receiver believes he can then recover any equity that someone else obtains from the properties post-abandonment. As a matter of law, the Receiver lacks this power. Abandoned means abandoned.

In Colorado and other jurisdictions “the office of a receiver is that of a trustee[.]” *Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931); *Janvey v. Alguire*, Case No. 3:09-CV-0724-N, 2014 WL 12654910, *3 (N.D. Tex. July 30, 2014) (“Equity receiverships in the United States can be traced back to the Chancery courts of England, and the relationship between bankruptcy and common law receiverships in the United States dates back to the 1800s.”); *see also Kelley v. College of St. Benedict*, 901 F.Supp.2d 1123, 1128 (D. Minn. 2012) (“A federal equity receiver is akin to a bankruptcy trustee.”).

Thus, the Receiver relied on the Bankruptcy Code to support seeking and obtaining authorization to abandon the assets of the Receivership Estate described above. (YM Motion, ¶ 15; Residential Order, ¶ 4; Clearwater Motion, ¶ 6; Ash & Bellaire Motion, ¶ 8.) Specifically, the Receiver cited section 544 of the Bankruptcy Code to support his position that a receiver is authorized to abandon property if it is of inconsequential value or benefit to a receivership estate, just as a bankruptcy trustee is authorized to abandon property that is of inconsequential value or benefit to a bankruptcy estate. *Id.* (citing 11 U.S.C. § 554(a); 65 AM. JR. 2D Receivers § 156). The U.S. District Court for the District of Colorado has held that “[a] bankruptcy court may

order abandonment of property if it finds neither benefit nor value to the debtor's estate from administering such property." *Omni Development Corp. v. Atlas Assur. Co. of America*, 956 P.2d 665, 669 (D. Colo. 1998). But the same Bankruptcy Code upon which the Receiver relies precludes the Receiver from treating abandonment as he does here.

A. The Court Should Clarify that Abandoned Property Reverts Back to the Pre-
Receivership Owner

Interpreting the same bankruptcy law on which the Receiver relied to obtain approval to abandon properties, state and federal courts in Colorado have held that "[w]hen a bankruptcy court orders property to be abandoned, title in the property reverts back to the debtor." *Id.* (citing 11 U.S.C. 554(c) (1998); *Black v. First Federal Savings & Loan Ass'n*, 830 P.2d 1103, 1109 (Colo. App. 1992)). "Abandonment by the trustee of an asset immediately reverts title to that asset in the bankrupt[.]" *In re Polumbo*, 271 F.Supp. 640, 643 (W.D. Vir. 1967). "When the court grants a trustee's petition to abandon property in a bankrupt's estate, any title that was vested in the trustee is extinguished, and the title reverts to the bankrupt, nunc pro tunc." *Mason v. C.I.R.*, 646 F.2d 1309, 1310 (9th Cir. 1980). "The bankrupt 'is treated as having owned it continuously.'" *Id.* "Following abandonment, 'whoever had the possessory right to the property at the filing of bankruptcy again reacquires that right.'" *In re Dewsnap*, 908 F.2d 588, 590 (10th Cir. 1990).³

³ Further, title to abandoned property reverts to the debtor regardless of the form of the asset. *See, e.g., In re Duvall*, No. 14-30508, 2016 WL 7187622 (Bankr. W.D.N.C. Dec. 9, 2016) (abandonment of interests in three limited liability companies); *Mason*, 646 F.2d at 310 (abandonment of corporate stock); *BancOhio Natl. Bank v. Nursing Ctr. Serv., Inc.*, 573 N.E.2d 1122, 1127 (Ohio. Ct. App. 1988) ("The effect of the abandonment was merely to restore [debtor] to ownership of the stock as if he had owned the stock continuously.")

Courts in other jurisdictions have held that the principles applicable to abandonment by bankruptcy trustees are equally applicable to abandonment of assets by a receiver. For example, one California court held that:

Upon abandonment of assets by a trustee in bankruptcy by leave of court the title reverts to and remains in the bankruptcy. He is entitled to reassert ownership of such assets.

....

No cases have been furnished to us in which a receiver was appointed but the result would be the same as in cases involving a trustee in bankruptcy. Whether it be a receiver or a trustee he is appointed by the court, he is an officer of the court subject to the court's direction, and he takes charge of the assets of the defendant or of the bankrupt, as the case may be, in order to preserve them for the benefit of the creditors of an individual and of the creditors and stockholders if the party be a corporation. Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines the court may upon his petition authorize the abandonment of the worthless property.

When the federal court authorized its receiver to abandon the judgments described in the pleadings and he did abandon them, title reverted to defendant association and the claim of an interloper amounted to exactly nothing.

Helvey v. U.S. Bldg. & Loan Ass'n of Los Angeles, 184 P.2d 919, 921 (Cal. Dist. Ct. of Appeal 1947). The Court should clarify that, contrary to the Receiver's position, assets abandoned by him in the past or in the future, including property and interests in limited liability companies that own and manage properties, revert to their pre-receivership owners consistent with well-established principles governing bankruptcy and receiverships. Here, that would mean abandoned properties revert to the single purpose LLCs that own them.

B. The Court Should Clarify that the Receiver and Receivership Estate are Divested of Control of Abandoned Properties

The Receiver also takes the position that the Receivership Estate did not abandon (i) the single purpose LLCs that own the Abandoned Properties or (ii) the management and operation of

those single purposes LLCs.⁴ Courts, including the Tenth Circuit Court of Appeals, have held that “[a]bandoned property is *not* property administered by the estate.” *In re Dewsnup*, 908 F.2d at 590 (emphasis in original). Moreover, “[t]he effect of abandonment by a trustee . . . is to divest the trustee of control over the property because once abandoned, property is no longer part of the bankruptcy estate.” *See, e.g., Matter of Killebrew*, 888 F.2d 1516, 1520 (5th Cir. 1989) (quoting *Matter of Enriquez*, 22 B.R. 934, 935 (Bankr. D. Neb. 1982)); *see also Omni Development*, 956 P.2d at 670 (“*Upon abandonment, the debtor’s estate is divested of control of the property, . . .*” (emphasis added)).⁵ “The effect of abandonment is that ownership *and control* of the asset is reinstated in the debtor with all rights and obligations as before filing a petition in bankruptcy.” *In re Purco*, 76 B.R.523, 532 (Bankr. 1987) (emphasis added). “Such abandonment is to the person having the possessory interest in the property.” *Id.* “Generally, a ‘possessory interest’ is defined as a ‘right to exert control over’ or a ‘right to possess’ property ‘to the exclusion of others.’” *In re Cruseturner*, 8 B.R. 581, 591 (Bankr. D. Utah 1981). “Thus, whoever had the possessory right to the property at the filing of bankruptcy again reacquires that right.” *Id.*

If the Receiver retained his interest in and management and control of the LLCs after abandoning property, it would be impossible for the Receiver to abandon the property. Since abandoned properties revert back to the pre-receiver owner, that would mean the abandoned properties here revert back to the single purpose LLC that owns them. If the Receiver retained

⁴ The Receiver abandoned his interest in the LLCs that own the abandoned YM and Clearwater properties. But as to the rest of the abandoned properties, the Receiver asserts he abandoned just the property and not his interest in or management and control rights over the single purpose LLCs owning those properties.

⁵ To the extent creditors have any interests in the property, those interests must be realized through the legal procedures under state law because “abandonment is not a means of effecting transfer of title[.]” *Omni Development*, 956 P.2d at 670.

the interest in and management and control rights over those LLCs, that means the abandoned properties would revert back to the Receiver. In light of this fact, and applicable analogous bankruptcy law, the Court should clarify that when the Receiver abandons property, he also abandons his interest in, and management and control over, the LLCs that own those properties.⁶

C. The Court Should Clarify That the Receiver Has No Claim to Equity from a Property Once Abandoned

The Receiver claims that, after he abandons a property, if someone else makes a profit or gains equity on it, the Receiver may swoop back in and seize that equity for the Receivership Estate. Courts have held, however, that “once a scheduled asset of the estate has been abandoned, it is no longer part of the estate and is thus beyond reach and control of the trustee.” *Matter of Enriquez*, 22 B.R. at 936. “Once he has elected to abandon an asset, *the trustee is absolutely precluded from later reclaiming it, even if a subsequent increase in its value would make it of benefit to the estate.*” *In re Polumbo*, 271 F. Supp. at 643 (emphasis added).

In *In re Sutton*, 10 B.R. 737, 740 (Bankr. E.D. Vir. 1982), the bankruptcy trustee abandoned residential property owned by the debtor after determining that the value of equity in the residence was inconsequential to the estate. The debtor subsequently sold the property and realized equity of approximately \$7,000. *Id.* The trustee applied for revocation of the court-ordered abandonment. *Id.* The court denied the trustee’s request by holding that “abandonment is deemed irrevocable regardless of any subsequent discovery that the property had greater value than previously believed.” *Id.* (internal quotation omitted). These principles governing

⁶ The LLCs are single purpose entities that own only a single property. Thus, the Receiver may abandon the LLC interests and management and control of the LLCs without affecting any other properties.

abandonment of property in bankruptcy estates apply to receiverships under Colorado law, as the Receiver's reliance on the Bankruptcy Code demonstrates. The Court should clarify that the Receiver has no claim to any post-abandonment equity or profit generated by someone else from property abandoned by the Receiver.

CONCLUSION

Here, the Receiver wants to have it both ways. He wants to abandon his obligation to manage certain properties in the Receivership Estate, yet retain his ability to swoop in and collect any value someone else generates from the property after the Receiver abandons it. This would mean, for example, that if a lender foreclosed on an abandoned property, bought it out of foreclosure, and then sold it for a profit, the Receiver could seize the lender's profit long after the Receiver abandoned the property. The law does not allow that. For the foregoing reasons, the Defendant respectfully requests that the Court enter an order clarifying that under the Receivership Order and the Abandonment Orders (i) the assets already abandoned by the Receiver, including the YM assets, the Residential assets, the Clearwater assets, and the Ash & Bellaire assets, and any assets abandoned in the future, revert to the LLCs that own them; (ii) those LLCs and their managers, not the Receiver, retain control of assets abandoned by the Receiver; and (iii) equity or profit derived from the disposition of assets abandoned by the Receiver are not property of the Receivership Estate.

Moreover, because some of the assets previously abandoned, including ones very recently abandoned, are currently in foreclosure proceedings and those that are not likely will be soon, Defendant respectfully requests an expedited briefing schedule regarding this Motion. Specifically, Defendant requests that the Court order a deadline for the Receiver to respond

within ten (10) days, and Defendant to file a reply five (5) days following the filing of a response.

Respectfully submitted this 17th day of March 2020.

JONES & KELLER, P.C.

/s/ Christopher S. Mills

Paul Vorndran, #22098

Chris Mills, #42042

1999 Broadway, Suite 3150

Denver, CO 80202

Teleph: (303) 573-1600

Facsimile: (303) 573-8133

ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER AND ORDERS AUTHORIZING ABANDONMENT AND FOR EXPEDITED BRIEFING SCHEDULE** was filed and served via the ICCES e-file system on this 17th day of March 2020 to all counsel of record for the parties to the action, including the following:

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout St., Suite 1100
Denver, Colorado 80202
Phone Number: (303) 534-4499
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

Counsel for Receiver

Robert W. Finke
Janna K. Fischer
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, Colorado 80203
Sueanna.Johnson@coag.gov
Robert.Finke@coag.gov

*Counsel for David S. Cheval, Acting
Securities Commissioner for the
State of Colorado*

/s/ Blaine K. Bengtson
Blaine K. Bengtson