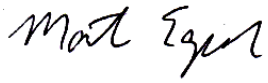
DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	DATE FILED: October 1, 2020 1:17 PM CASE NUMBER: 2018CV33011
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al. v. **Defendant(s)** GARY DRAGUL et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2018CV33011 Division: 424 Courtroom:

Order:Defendant Gary Dragul's Motion to Order Claims Abandoned (w/attach)

The motion/proposed order attached hereto: DENIED.

It appears from the pleadings that, given its review of the case, the receiver does not believe it has a sufficient basis to pursue claims against the third parties identified in the motion, consistent with its obligations pursuant to C.R.C.P. 11. Nor does it appear from the pleadings that Mr. Dragul, through his counsel, has provided the receiver (through conferral or otherwise) a sufficient basis from which the receiver can determine whether or not viable claims may be asserted as to third parties. As such, the Court cannot determine whether or not any purported claims are viable and/or are deemed abandoned.

Issue Date: 10/1/2020



MARTIN FOSTER EGELHOFF
District Court Judge

DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants**: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	▲ COURT USE ONLY ▲
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 TO ORDER CLAIMS ABANDONED

Defendant Gary Dragul through undersigned counsel, moves for this Court to order that certain civil claims that the Receiver has refused to pursue are abandoned.

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Receiver, and the Receiver opposes this Motion. Counsel for Gary Dragul spoke with counsel for the Colorado Securities Commissioner about the Motion last week, emailed a conferral on August 31, and left a voice mail message on September 2, but the Commissioner has not responded with her position.

INTRODUCTION

The August 30, 2018 Order Appointing Receiver ("Receivership Order") provides that the Receiver may assert claims belonging to the Receivership against third parties. While a receiver may have discretion to bring claims or not, he or she has a fiduciary duty to pursue claims that would result in benefit to the receivership estate and creditors. The Receiver here has asserted many such claims. However, the entities in Receivership have several other claims which the Receiver has not pursued.

Just as a debtor in bankruptcy may move the court to deem estate assets abandoned even if the trustee does not, *e.g.*, 11 U.S.C. § 554(b), Mr. Dragul may do so here in Receivership. Mr. Dragul, though counsel, identified several of the claims the Receiver has failed to bring—including who could assert them, against whom they would be asserted, and the subject matter of each claim—during the meet and confer process. Since the Receiver had not asserted these claims, and since in his most recent report, the Receiver identified the Estate assets remaining and these claims were not among them, Mr. Dragul asked the Receiver to confirm he had abandoned the claims.

The Receiver's counsel responded that the Receiver has abandoned nothing except that for which the Court has granted the Receiver's motions to abandon. But he refused not only to bring the civil claims Mr. Dragul identified, but to even investigate whether the Receiver would bring such claims. Having refused to take up the claims himself, and with statutes of limitation poised to expire, the Court should order those claims abandoned before they are lost forever.

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BACKGROUND

1. On August 15, 2018, the Commissioner for the Colorado Division of Securities filed a complaint for injunctive and other relief against Mr. Dragul, GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") (collectively, GDARES and GDAREM are referred to as the "GDA Entities") (Case Number 2018CV33011).

2. On August 30, 2018, the Court entered the Receivership Order appointing Harvey Sender as receiver ("Receiver") for Dragul (in a limited capacity), the two GDA Entities, and their assets "including, but not limited to . . . claims, and causes of action[.]" (Receivership Order ¶ 9.)

3. The Receivership Order also provides that "[c]onsistent with Colorado's dissolution statutes and applicable law, and as set forth in greater detail below, the Receiver may, in the exercise of his reasonable judgment, investigate any claims and causes of action which may be pursued for the benefit of Dragul, GDARES, [and] GDREM, . . . and make recommendations to interested parties and this Court regarding prosecution of any such claims and causes of action[.]" (Receivership Order ¶ 9.)

4. It also authorizes the Receiver to "prosecute causes of action of Dragul, GDARES and GDAREM against third parties[.]" (Receivership Order ¶ 13(n).)

5. The Receivership Order directed the Receiver to analyze the books and records of Dragul and the GDA Entities and file an initial report which "shall identify any claims and causes of action of Dragul, GDARES and GDAREM, identified as of the date of such report . . . and the Receiver's recommendations related thereto." (Receivership Order ¶ 14.)

6. Finally, the Receivership Order 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, provided that Court approval shall not be required of any sale or disposition of any property being sold for a sales price of less than $10,000[.]" (Receivership Order ¶ 13(t).) Relying on this provision and bankruptcy law, the Receiver has previously abandoned real property.

7. In his November 28, 2018 initial report required under Paragraph 14 of the Receivership Order, the Receiver stated he was in the process of identifying and investigating potential claims, but did not identify any. He said the same in his May 15, 2019 second report. In his November 14, 2019 third report, he identified myriad claims, many of which he had already asserted and some of which he had already settled, and he noted he was preparing additional litigation claims he anticipated filing by the end of the month. In his fourth report filed on May 11, 2020, the Receiver identified many claims and described their status. But he also stated that his sale of Estate assets was complete, that he "will continue to pursue the pending Insider and Dragul Family Cases and potentially a fraudulent transfer case against Ms. Ahrendt" and that he "anticipates the Estate will remain open until those cases are resolved[.]" He did not identify any other claims.

8. The GDA Entities have several claims they could assert which the Receiver never identified in any of his reports. For that reason, Mr. Dragul reached out to the Receiver to confirm that the Receiver had abandoned such claims. The Receiver's counsel asked for more information about the claims, and Mr. Dragul responded with the following:

- Malpractice and related claims against various law firms or other professionals that assisted Mr. Dragul and the GDA Entities with many transactions including those at issue in the indictments and in the Receiver's civil cases; e.g.:
    - Against GDA's in-house lawyer Elizabeth Gold, who handled many of the promissory notes, including documentation and negotiations. She also handled the X12 Housing transactions which were owned 100% [by] Gary;
    - Against the [law] firm Robbins, Kelly, Patterson & Tucker, which advised on the Prospect Square property transaction, including the workout with the lender;
    - Against [the law firm] Greenberg Traurig in connection with the Plaza Mall of Georgia transaction (especially in terms of the part of the transaction involving Hagshama and Fox, the sale, and working with the lender Principal Mutual Insurance Company);
    - Against [the law firm] Brownstein [Hyatt Farber Schreck], which assisted with and drafted documents for a variety of transactions including the purchase of the Pure Entertainment Group, which was then merged with Angel Management Group in Las Vegas, the transaction for the YM Property, Rose LLC's creation and acquisition of Senor Frogs, a variety of notes, the transaction involving the Plainfield Property, the transaction involving the Clearwater Property, the transaction involving Plaza Mall of Georgia, and a variety of SPEs. If there was anything improper about any of these transactions, Brownstein played a role;
    - Against Kelly Reinhart, who was GDA's long-time CPA, related to the GDA Entities' accounting and record keeping, including how investor funds were maintained and handled. Reinhart may also have misstated ownership of one or more entities on various tax filings, mischaracterized properties in ways that put non-receivership property into the receivership estate, and he failed to provide Gary tax information which required hiring and paying other professionals;
    - Against the environmental companies[1] that worked on the YM Retail environmental issues, arising from their failure to uncover the alleged environmental contamination in 2002 when the property was purchased, and failure to timely address the alleged environmental contamination to the State's satisfaction after it was discovered around 2007[.]

(Exhibit 1 at 6, attached hereto.)[2]

9. In response, the Receiver's counsel said: "First, I would note what should be apparent to you as an experienced commercial trial lawyer: The Receiver has not abandoned

[1] For this Motion, specifically Terracon.

[2] Mr. Dragul identified several additional claims with less specificity (though with enough detail that the Receiver could easily run such claims to ground if he so chose), which Mr. Dragul does not put at issue in this Motion and which are omitted in this list.

anything other than that which he specifically moved to abandon, and for which he has obtained court orders." (Ex. 1 at 3.) He also claimed to be ignorant of these claims, and directed Mr. Dragul's counsel to provide: (1) a legal analysis of who has standing to assert each claim; (2) the particular claims to be asserted (apparently beyond what Mr. Dragul's counsel already identified); (3) the factual basis for all the claims Mr. Dragul's counsel already identified; and (4) an analysis of applicable statutes of limitations to the extent claims were or would soon be time-barred. (*Id*.) He said "[u]ntil we get this information, we cannot meaningfully confer with you any further on these issues." (*Id*.) He did not indicate any willingness to investigate or pursue these claims himself.

10. The Receiver's counsel also said that if the claims "are owned by GDA and/or Dragul as your email suggests, then all recovery would be property of the estate." (Ex. 1 at 3.)

11. Mr. Dragul responded by pointing out that the Receiver's refusal to look into and prosecute the claims itself appeared to be abandonment. (Ex. 1 at 1-2.) The Receiver's counsel then simply asserted that Mr. Dragul's points were "astonishingly opaque, self-serving, and circular . . . baseless . . . uninformed . . . [and] unsupported." (*Id.* at 1.) He noted he opposed this Motion, which he characterized as one "through which Mr. Dragul seeks to further abscond with property of the estate[,]" though he refused to himself do anything with that purported property of the Estate. (*Id.*)

ARGUMENT

"A receiver is a fiduciary of the court and of the persons interested in the estate." *K-Partners III, Ltd. v. WLM Hosp. Corp.*, 883 P.2d 604, 606 (Colo. App. 1994); *see also Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) (same). 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 previously relied on the Bankruptcy Code to abandon real property assets of the Receivership Estate. (*See, e.g.*, November 28, 2018 Receiver's Motion to Abandon Property (YM Retail 07 A, LLC and Safeway Marketplace Manager 07, Inc.) ¶ 15; October 11, 2019 Receiver's Motion to Abandon 15 Residential Properties ¶ 4; February 19, 2020 Receiver's Motion to Abandon Clearwater Collection ¶ 6; February 21, 2020 Receiver's Motion to Abandon Ash & Bellaire Properties ¶ 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 power to abandon is not limited to real property, but includes any asset of the estate, including a legal claim. *E.g.*, *Barletta v. Tedeschi*, 121 B.R. 669, 671-72 (N.D.N.Y. 1990) (noting that a cause of action can be property of the estate and that "[t]he trustee may, after notice and a hearing to creditors, abandon 'any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.'" (citing 11 U.S.C. 554(a)). And Paragraph 9 of the Receivership Order defines "assets"

of the Receivership Estate to include not only real property, but also "claims, and causes of action[.]"

It is well established that the power to petition the court to authorize abandonment of property is not limited to the trustee—other parties in interest such as the debtor may do the same. 11 U.S.C. § 554(b); Fed. R. Bank. P. 6007(b); *Barletta*, 121 B.R. at 671-72 ("The debtor is a 'party in interest' who may request abandonment of estate property.")(citing 11 U.S.C. § 445(b); Bankruptcy Rule 6007(a) & (b); 8 Collier on Bankruptcy ¶6007.03[1] (15th ed. 1988)). That is what Mr. Dragul seeks to do here.

I. The Court Should Order the Claims Abandoned Because the Receiver Refused to Investigate, Let Alone Prosecute, Them

The Receiver owes fiduciary duties. *K-Partners III*, 883 P.2d at 606. "[A] receiver is chargeable with the value of property which would have come into his hands but was lost due to his failure to act" and "a receiver may be liable for failure to ask for authority to bring suit if his lack of diligence results in loss of the claim." *In re American Bridge Products, Inc.*, 328 B.R. 274, 334 (Bankr. D. Mass 2005), *vacated on other grounds by* 599 F.3d 1 (1st Cir. 2010). In *In re American Bridge Products*, the court held that the receiver "was grossly negligent and breached his fiduciary duties as Receiver" because, among other things, "[h]e failed to recognize and proceed with causes of action, which, if pursued, more likely than not, would have resulted in full payment of [certain] creditors." *Id.* at 341-42. And the Receivership Order here charged the Receiver with researching and identifying any claims and causes of action belonging to the Receivership Estate, and to report the Receiver's recommendations related thereto. (Receivership Order ¶ 14.)

Under this authority, there are three possibilities with respect to claims held by the Receivership Estate: (1) the Receiver identifies and pursues them; (2) the Receiver either fails to identify or refuses to pursue such claims, and thereby breaches his fiduciary duties; or (3) in the exercise of reasonable judgment, the Receiver determines the claims are not worth bringing because they lack sufficient value for the Estate. Unless the Receiver changes his mind and decides to bring the claims in response to this Motion (to the extent they are not already time-barred), it is apparent that he rejected possibility (1) as he has refused to investigate, let alone assert, the claims Mr. Dragul identified. Presumably, the Receiver is not intending to breach his fiduciary duties by refusing to identify and pursue the claims, so possibility (2) appears unlikely. That leaves (3)—the Receiver has determined the claims are not worth bringing on behalf of the Receivership Estate.

If the Receiver has determined the claims are not worth bringing and has thus refused to bring them, that should be deemed abandonment. In a bankruptcy, if the trustee both fails to abandon and fails to pursue a claim, that claim along with any other scheduled assets remaining revert to the debtor once the bankruptcy proceeding concludes. 11 U.S.C. § 554(c); *Richards v. D.R. Horton, Inc.*, 740 S.E.2d 732, 734 (Ga. App. 2013). The same is true in receivership. *E.g.*, *Rossi*, 299 P. at 33 (receiver akin to bankruptcy trustee); *Janvey*, 2014 WL 12654910, *3 (same) *Kelley*, 901 F.Supp.2d at 1128 (same). Thus, any claims the Receiver refuses to pursue will return to the pre-Receivership owner in any event. However, if the Receiver waits until the close of the Receivership, the statute of limitations will have run on many of those claims. In *Barletta*, 121 B.R. at 674, the debtor filed suit just before the limitations period expired after the trustee suggested he would abandon the claim but before the trustee had actually abandoned. The court

refused to dismiss the debtor's claim and held that once the claim was abandoned automatically at the close of the bankruptcy estate, the claim reverted back to the debtor, and that the debtor was then retroactively deemed to have had title to the claim all along. *Id.* It so held even though the debtor never moved the bankruptcy court to order the claim abandoned. *Id*. Unlike the successful debtor in *Barletta*, Mr. Dragul is following the proper procedure here and moving for an order of abandonment before asserting the claims. For the same reasons the debtor in *Barletta* prevailed, the Court should order the claims here abandoned before they are lost forever.

II. The Abandoned Claims, and Anything Recovered From Them, Revert Back to Their Pre-Receivership Owner

Interpreting the same bankruptcy law on which the Receiver relied to obtain approval to abandon real 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." *Omni Development Corp. v. Atlas Assur. Co. of America*, 956 P.2d 665, 669 (D. Colo. 1998) (citing 11 U.S.C. 554(c) (1998); *see also Black v. First Federal Savings & Loan Ass'n*, 830 P.2d 1103, 1109 (Colo. App. 1992)). "Abandonment by the trustee of an asset immediately revests 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 Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990).[3]

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 bankrupt. 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).

[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.") So whether real property or choses in action, they revert back to their pre-Receivership owner following abandonment.

Courts, including the Tenth Circuit, have held that "[a]bandoned property is *not* property administered by the estate." *In re Dewsnup*, 908 F.2d at 590 (emphasis in original). And "[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[.]"). "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. W.D. Penn. 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.*

For that reason, "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). This applies with equal force to claims abandoned by the trustee or receiver—they revert to the debtor or the person or entity in receivership who owned them pre-receivership. *E.g*. *Barletta*, 121 B.R. at 671-72 ("If the trustee

chooses to abandon the claim or is ordered by the court to do so, the debtor may then assert title to the cause of action and bring suit on it.")

These principles governing abandonment of property in bankruptcy estates apply to receiverships under Colorado law, as the Receiver's reliance on the Bankruptcy Code to abandon real property demonstrates. Thus, by abandoning the civil claims identified here, the Receiver relinquishes all entitlement to assert them, or to sweep any recovery realized from them, and they revert to the pre-Receivership owner.

CONCLUSION

Since the Receiver has refused to investigate or pursue the claims Mr. Dragul identified, he has either breached his fiduciary duties or determined those claims are not worth pursuing on behalf of the Estate. Presumably the latter exists here, and the Court should order the claims identified in paragraph 8 on pages 4-5 above abandoned before the statutes of limitation run.

Respectfully submitted this 3rd day of September, 2020.

JONES & KELLER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION TO ORDER CLAIMS ABANDONED** was filed and served via the ICCES e-file system on this 3rd day of September 2020 to all counsel of record for the parties to the action, including the following:

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