

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202	DATE FILED: February 5, 2021 5:05 PM CASE NUMBER: 2018CV33011
<hr/> <p>Plaintiff:</p> <p>Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants:</p> <p>Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC</p>	<hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2018CV33011</p> <p>Courtroom: 424</p>
<p>ORDER (Defendant Gary Dragul’s Motion for Limited Discovery Regarding Brownstein Settlement)</p>	

The matter is before the Court on Defendant Gary Dragul’s Motion for Limited Discovery regarding Brownstein Settlement. The Court, having reviewed the motion, the responsive briefs, the Court’s file, and the applicable legal authority, finds, concludes and orders as follows:

PROCEDURAL BACKGROUND

On November 16, 2020, the Receiver filed a Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP (“Brownstein”). Upon the objection of Defendant Gary Dragul (“Dragul”) to the Receiver’s motion, the Court authorized a hearing on the motion. The hearing is scheduled on February 19, 2021.

Dragul filed the instant motion for limited discovery on January 21, 2021. In the motion, Dragul seeks (1) communications between the Receiver and Brownstein related to the claims asserted in the complaint filed by Dragul and the proposed settlement; and (2) documents and communications reflecting the efforts the Receiver undertook to investigate the claims against Brownstein. The Receiver and Brownstein object to this discovery request.

ANALYSIS

On August 30, 2018, the Court approved the stipulated order for appointment of Harvey Sender for Dragul, GDA Real Estate Services, LLC (“GDARES”), and GDA Real Estate Management, Inc. (“GDAREM”). The Receivership Order accords the Receiver authority to prosecute cause of actions against third parties. Receivership Order, ¶¶13(o) and (s).

At the February 19, 2021 hearing, the Court will consider the propriety of the proposed settlement between the Receiver and Brownstein. As Colorado courts have not set forth a standard of review to apply when reviewing a receiver's recommendations regarding settlement, the Court looks to the standards articulated by bankruptcy courts for guidance. Under those standards, the Court must determine whether "the settlement is fair and equitable and in the best interests of the estate." *In re W. Pac. Airlines, Inc.*, 219 B.R. 575, 579 (D. Colo. 1998). The Court's decision to approve the settlement must be "an informed one based upon an objective evaluation of developed facts." *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997). That determination requires the Court to "consider the probable success of the underlying litigation on the merits, the possible difficulty in collection a judgment, the complexity and expense of the litigation, and the interest of creditors in deference to their reasonable views." *Id.* Moreover, as with trustees, the Court must grant the receiver "considerable deference to exercise [his] business judgment with respect to settlements." *In re Ortiz*, 619 B.R. 273, 275 (Bankr. M.D. Fla. 2020).

Here, the Court finds that the information sought by Dragul is not relevant to the issues raised by the Receiver's motion to approve the settlement agreement with Brownstein. First, despite Dragul's arguments to the contrary, the Court finds that Dragul's claims all depend on the underlying proposition that these settlement communications will establish that the Receiver undervalued the claims against Brownstein in the proposed settlement. However, Colorado Rule of Evidence 408(a) "prohibits the admission of evidence to compromise 'when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity of amount.'" *Dorsey & Whitney LLP v. RegScan, Inc.*, No. 16CA0817, 2018 WL 1007942, at *12 (Colo. App. February 22, 2018) (not released for publication in the permanent law reports) (quoting CRE 408(a)). Thus, any settlement communications between the Receiver and Brownstein are not discoverable because they are not probative of the determinations that the Court must make at the February 19, 2021 hearing.

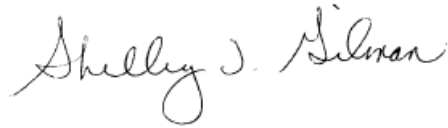
Second, to the extent that Dragul seeks settlement communications and documentation of the Receiver's investigation of the Brownstein claims to establish that the Receiver did not fulfill his fiduciary duty in investigating and settling those claims, the Court finds that the issue of the fulfillment of the Receiver's fiduciary duty is not an independent issue for the Court's determination of the motion to approve settlement. Certainly, while the Court must lend considerable deference to the exercise of the Receiver's business judgment, the Court understands that the Receiver's business judgment is not without limits. Nevertheless, the Court's determination centers on the issue of whether the settlement is fair and equitable, and in the best interest of the estate and its creditors. *See Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) (affirming trial court's finding of no breach of fiduciary duty by receiver when action was "reasonably related to the management, operation, and protection of the property"). Accordingly, neither the settlement communications nor the Receiver's investigation and conclusions dating back to the original Receivership Order entered on August 30, 2018, are probative of that issue.

CONCLUSION

Therefore, the Court denies Defendant Gary Dragul's Motion for Limited Discovery regarding Brownstein Settlement.

DATED: February 5, 2021

BY THE COURT:

Handwritten signature of Shelley I. Gilman in cursive script.

SHELLEY I. GILMAN
District Court Judge