

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-CV-81205-RAR**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

/

**RECEIVER'S REPLY TO DEFENDANTS JOSEPH LAFORTE AND LISA
MCELHONE'S OPPOSITION TO MOTION FOR ORDER: (1) AUTHORIZING
RECEIVER'S SALE OF ALL REAL PROPERTY WITHIN THE RECEIVERSHIP
ESTATE; AND (2) COMPELLING LISA MCELHONE AND JOSEPH LAFORTE TO
VACATE AND SURRENDER HAVERFORD HOME OR, IN THE ALTERNATIVE,
PAY OBLIGATIONS FOR SINGLE-FAMILY HOMES**

Ryan K. Stumphauzer, Esq., Court-Appointed Receiver (the “Receiver”) of the Receivership Entities, by and through his undersigned counsel, hereby files his Reply to Defendants Joseph LaForte (“LaForte”) and Lisa McElhone’s (“McElhone”) (collectively, the “Defendants”) Response [ECF No. 1497] (the “Response”) in opposition to the Receiver’s Motion for an Order: (1) Authorizing Receiver’s Sale of All Real Property Within the Receivership Estate; and (2) Compelling Lisa McElhone and Joseph LaForte to Vacate and Surrender Haverford Home or, in the Alternative, Pay Obligations For Single-Family Homes [ECF No. 1484] (the “Motion”) and states:

INTRODUCTION

The Defendants have not advanced any arguments that should cause the Court to reconsider its previous decision to grant the Motion. In their Response, Defendants attempt to explain why the Receiver should not be permitted to sell the real property within the Receivership Estate based

on: (i) the pendency of their appeals to the Eleventh Circuit; (ii) the value of the Properties as sources of income; and (iii) an allegedly expired agreement regarding the residential properties (the “Agreement”). Each of these arguments is unavailing. Rather, as explained in the Motion, authorizing the Receiver to sell the real estate and requiring the Defendants to honor their obligations or vacate the Haverford property are in the best interest of the Receivership Estate. Accordingly, the Court should grant the Receiver’s Motion.

ARGUMENT

Pursuant to the Amended Order Appointing Receiver (ECF No. 141) (the “Amended Appointment Order”), the Receiver is authorized, subject to various conditions and requirements, to “list for sale or lease, engage a broker for sale or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the Receivership Estates. (Amended Appointment Order at ¶ 38). Additionally, “[u]pon further Order of this Court, pursuant to such procedures as may be required by this Court and additional authority such as 28 U.S.C. §§ 2001 and 2004, the Receiver will be authorized to sell, and transfer clear title to, all real property in the Receivership Estates.” (*Id.* at ¶ 39).

A. The Receiver Should Be Permitted to Market the Receiver-Controlled Properties for Sale Pending Disposition of the Eleventh Circuit Appeals.

Defendants argue that the L.M.E. 2017 Family Trust (the “Trust”) would be permanently divested of its ownership interests in the real property if sales are permitted while certain matters are on appeal, thereby subjecting the Trust to “irreparable harm.” (Response, p. 2).

This argument is wrong in multiple respects. First, sale of the real property will ***not*** diminish any value for Defendants or subject them to potential harm. Proceeds from the sale of these properties will flow directly and immediately into the Receivership Estate. Those proceeds will remain there, subject to further orders of the Court. And the Receiver’s retention of the cash

proceeds from any such sales makes clear that the Defendants will not incur any alleged irreparable harm. Put simply, the Receiver's Motion seeks to convert real estate assets into a cash asset – not to divest the Receivership Estate of value.

Second, Defendants' reliance in their Response on *SEC v. Ahmed*, 3:15-cv-675 (JBA), 2019 WL 11824928 (D. Conn. Nov. 26, 2019) is misplaced. In *Ahmed* the defendant sought to hold the judgment of the District Court "in abeyance pending the Supreme Court's decision" in deciding *Liu v. SEC*, 140 S. Ct. 1936, 591 U.S. ____ (2020), a significant case addressing a controlling question of law regarding disgorgement. Notably, the Supreme Court had already accepted certiorari in *Liu* and a decision was imminent. As the *Liu* decision would have potentially had a "substantial impact on the amount of the judgment in this case, . . . and thus would also likely affect which assets are available and/or necessary to satisfy the ultimate judgment amount," the District Court in *Ahmed* delayed the liquidation process pending the Supreme Court's ruling. (*Id.* at *3; internal citation omitted).

Ahmed is inapplicable here. Defendants do not identify any pending or imminent changes to controlling law. Rather, Defendants rely solely on the grounds they raised in their own direct appeal to the Eleventh Circuit. A defendant's appeal alone is an insufficient basis to enjoin a district court's action, as "the mere pendency of an appeal does not, in itself, disturb the finality of a judgment" and "[t]he district Court has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded." *C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, 750 F.Supp. 67, 69 (E.D.N.Y. 1990) (quotations and citations omitted). Moreover, *Ahmed* stayed the liquidation of relevant receivership assets pending a decision on the amount of the final judgment and the assets that may be available to satisfy the judgment in that case. Here, cash proceeds generated by the sale of the real estate will simply serve as a substitute for the value

of the real estate assets already within the Receivership Estate, irrespective of the outcome of Defendants' appeal.

Moreover, the real estate assets represent a substantial portion of the Receivership Estate that will be available for distribution in this case. Conservatively, the proper marketing and ultimate sale of the properties could take anywhere from six months to one year. To delay that process until after disposition of the Defendants' appeal would only further delay the Receiver's ability to make a distribution.

Finally, it is important to note that the Receiver is merely requesting the Court's approval to *begin* the process of marketing these properties for sale. The Receiver has not identified a potential buyer for any of the properties and is not requesting the Court's approval of a particular sale of any of the property within the Receivership Estate. Under the Amended Receivership Order, the Receiver will be required to file a subsequent motion and request the Court's approval before selling any of the property within the Receivership Estate. In other words, the marketing efforts the Receiver has proposed in the Motion are already within the Receiver's express authority under the operative Receivership Order and applicable law. As such, the Defendants' general objections to the Receiver's potential future sale of any of these properties are premature and, therefore, not properly before the Court at this time.

The Court is well within its authority to authorize the sale of the Receiver-Controlled Properties in the Receivership Estate. Defendants' unfounded speculation as to irreparable harm or the outcome of their appeal should not delay the Receiver's efforts to administer the Receivership Estate and maximize the recovery for investors.

B. Cash Proceeds Generated from the Marketing of the Receiver-Controlled Properties for Sale Will be Maximized Given the Current Philadelphia Residential Market.

Defendants argue that marketing the Receiver-Controlled Properties for sale “would strip the Receivership of a large and reliable source of income.” (Response, p. 2). To the contrary, the Receiver’s business judgment, supported by his analysis of the relevant real estate market, supports that marketing the Receiver-Controlled Properties for sale at the current time is in the best interest of the Receivership Estate.

As an initial matter, the \$1.1 million in rental income generated through October 31, 2022, although substantial in the abstract, represents a fraction of the \$172.8 million in tangible assets, including an estimated \$55 million of real estate assets, held in the Receivership Estate. (ECF 1437-1 at p. 5, 16). Moreover, the Court did not appoint the Receiver to exist indefinitely to manage the real estate portfolio. Rather, the Receiver must use the limited duration of the Receivership to maximize the value of the Receivership Estate.

It is the Receiver’s determination, based on his informed business judgment and in reliance on advice from his professionals, that marketing the Properties for sale, rather than continuing to rent them, best maximizes that value. The Receiver, with the assistance of experienced real estate professionals in the Philadelphia market, has analyzed the relevant market. Although the Philadelphia multi-family residential rental market appears to have stabilized in the short term, the inventory of competitive products will soon become unfavorable given the reported number of rental projects both under construction and planned for construction. Once these competing projects become available, the increased supply of rental units may adversely impact rental rates and concomitant values of rental properties, causing a likely decline in the value of and sales prices for the Receiver-Controlled Properties.

Courts frequently measure the value of property by its market value. *See Cnty. Bank v. C.I.R.*, 819 F.2d 940, 941 (9th Cir. 1987) (consistently referring to “fair market value” of property when discussing its value). Here, the Amended Order Appointing Receiver [ECF 141] authorized the Receiver to take all necessary and reasonable actions to cause the sale of all real property in the Receivership Estates “with due regard to the realization of the true and proper value of such real property.” By taking necessary steps to protect the market value of the Receiver-Controlled Properties (e.g., filing this Motion), the Receiver is preserving the value of the Receivership Estate’s assets. These steps also shield investors from any anticipated downturn in the Philadelphia real estate market. Given that the Receivership is not of infinite duration, the potential harm to the Receivership Estate if the Receiver-Controlled Properties are not presently marketed for sale supports the Receiver’s Motion.

C. The Agreement Between the Receiver and Defendants Has Not Expired and Has Been Confirmed Through the Parties’ Course of Dealings.

Defendants argue that the parties’ rental Agreement allegedly expired on February 23, 2022, and that “it would be inequitable to evict Defendants from their home or hold them responsible for payments under an expired Agreement.” (Response, p. 3, 6). But Defendants’ assertion—namely, that the Court should permit them to live rent-free in the residences—is contrary to law and equity.

Under Pennsylvania law, “[w]hen a lease for a term of years expires, and the lessee remains in possession, the landlord may at his option treat the lessee as a holdover tenant.” *Witmer v. Exxon Corp.*, 394 A.2d 1276, n. 3 (Pa. Super. Ct. 1978). Florida law provides for the same result. *See Executive Square Office Bldg. v. O’Connor & Assocs, Inc.*, 19 B.R. 143, 147 (Bankr. N.D. Fla. 1981) (“Under Florida law, if a lease has expired according to its terms or has been lawfully declared terminated by the lessor the tenant who then does not abandon or relinquish the premises

but holds over after such expiration or lawful declaration of termination becomes a tenant at sufferance.”). Since the prior term of the lease was one year, the holdover term also becomes one year, by operation of law. *Witmer*, 394 A.2d at n. 3. Furthermore, the law provides that the possession of the holdover is subject to the same terms, conditions, and covenants as the old lease. (*Id.*). And while it is the landlord’s option to treat a “holdover tenant” as a tenant for a term or as a trespasser, once the landlord has exercised that option and made his choice, he is bound by it. *Pagano v. Redevelopment Auth. of City of Philadelphia*, 376 A.2d 999, 1005 (Pa. Super. Ct. 1977).

The Agreement, a lease between the Receiver and Defendants, did not automatically terminate after one year. Instead, it simply converted to a holdover tenancy under the same terms and conditions. This conclusion comports with law and traditional notions of equity. A tenant cannot possess property, contrary to the landlord’s desires, for free. The tenant must provide the necessary payment or face eviction.

Defendants’ conduct also supports this conclusion. At no time prior to responding to this Motion did the Defendants contend that the Agreement with the Receiver had expired. Rather, the Defendants continued to pay the Receiver rent and to reimburse for residential expenses after the alleged “expiration.” In an August 8, 2022 email (attached hereto as “**Exhibit 1**”) from McElhone’s counsel, Alan S. Futerfas, to counsel for the Receiver, Gaetan J. Alfano, Mr. Futerfas wrote: “Please be advised that my admin went to Fedex this afternoon to try and get the last pick up for overnight tomorrow. The \$27,173 check [for August 2022 rent] is on its way via Fedex.” That amount included both rent and the reimbursement of residential expenses. Nearly six (6) months after the Agreement allegedly “expired,” Defendants were still paying rent on the Haverford Home.

Further, in a November 19, 2022 email (attached hereto as “**Exhibit 2**”) from LaForte’s counsel, David L. Ferguson, to counsel for the Receiver, Gaetan J. Alfano, Mr. Ferguson wrote: “I was just told the HOA [(the Jupiter Homeowners’ Association)] payment was mailed out yesterday.” This time, nearly nine (9) months after the Agreement allegedly expired, Defendants were still committing to pay residential expenses under the Agreement. Accordingly, the Defendants’ conduct in treating the Agreement as continuing belies their argument to the contrary.

Finally, Defendants’ refusal to pay residential expenses, while opposing the sale of the properties, is harming the Receivership Estate. When the Receiver filed his Motion, the Defendants owed \$61,481.17 in rent and residential expenses, including the above referenced Homeowners Association Fee (\$7,548.94) for the Jupiter property for the period of October 2022 through January 2023. Despite counsel for LaForte’s statement that he had been told that the HOA payment had been mailed (Ex. 2), the Homeowners Association notified the Receiver that it did not receive the payment. Thus, the Receiver had to step in and pay the Homeowners Association Fee to prevent a foreclosure on the Jupiter property.

Additionally, since the Receiver filed his Motion on January 10, 2023, Defendants have failed to pay \$15,172.67 in real estate taxes on the Paupack property, despite the Receiver’s demand that they do so. The unpaid taxes had been sent to the Bureau of Tax Claims for the eventual issuance of a tax certificate against the property. To preserve this asset of the Receivership Estate, the Receiver has since paid the taxes to prevent a tax sale of the property. The Defendants also have failed to pay the quarterly homeowners insurance installment for the Jupiter property in the amount of \$11,233.41. Once again, the Receiver made a demand for this payment, but the Defendants refused to comply with their obligations under the Agreement.

Accordingly, the Receiver stepped in to make the premium payment to prevent a lapse in coverage for this substantial asset.

The Defendants have foisted the expense of maintaining the value of the Receiver-Controlled Properties on the Receiver while preventing him from maximizing their value by marketing and selling them. Defendants' inequitable conduct is a burden on the Receivership Estate and further supports the Receiver's request to market and sell the properties.

Under the clear terms of the Amended Receivership Order, the Receiver is authorized to "take custody, control and possession of all Receivership Property," including "all real property of the Receivership Entities." (Amended Receivership Order, at 7(B), 19). The Defendants, as "persons . . . having control, custody or possession of any Receivership Property," are required under the Amended Receivership Order "to turn such property over to the Receiver." (*Id.*, at 15). Moreover, the Defendants are prohibited under the terms of the Amended Receivership Order from "[i]nterfere[ing] with the Receiver's efforts to take control, possession, or management of any Receivership Property." (*Id.*, at 29(A)). With respect to the Haverford property, the Defendants currently have two options. They can comply with the Agreement they reached with the Receiver under which they were permitted to continue to occupy this property in exchange for paying rent, as well as other expenses associated with the three residential properties. If they no longer wish to abide by this Agreement, they must comply with the terms of the Amended Receivership Order and vacate the property. What they cannot do—which is what they are apparently asking the Court to authorize—is continue to reside in Receivership Property without the Receiver's permission, in violation of the Amended Receivership Order.

CONCLUSION

WHEREFORE, for the foregoing reasons and those further explained in the Motion, the Receiver respectfully requests that the Court enter an Order: (1) authorizing the Receiver to begin the process of marketing and selling the Receiver-Controlled Properties; (2) requiring McElhone and LaForte to vacate and surrender the Haverford Home to the Receiver within 90 days, provided, however, that if McElhone and LaForte pay the past due rent for the Haverford Home, and all other residential expenses and carrying costs for all three Single-Family Homes, the Receiver would allow McElhone and LaForte to continue to occupy the Haverford Home, until further Order of Court; and (3) granting such other and further relief as the Court deems just and proper.

Dated: January 27, 2023

Respectfully Submitted,

**STUMPHAUZER KOLAYA
NADLER & SLOMAN, PLLC**
Two South Biscayne Blvd., Suite 1600
Miami, FL 33131
Telephone: (305) 614-1400

By: /s/ Timothy A. Kolaya
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Co-Counsel for Receiver

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By: /s/ Gaetan J. Alfano
GAETAN J. ALFANO
Pennsylvania Bar No. 32971
(Admitted Pro Hac Vice)
gja@pietragallo.com

Co-Counsel for Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27, 2023, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Timothy A. Kolaya
TIMOTHY A. KOLAYA

EXHIBIT 1

From: Alan Futerfas <ASFuterfas@futerfaslaw.com>
Sent: Friday, August 12, 2022 8:53 AM
To: Gaetan J. Alfano <GJA@Pietragallo.com>
Cc: Noah E. Snyder <noah.snyder@kaplanzeena.com>; James M. Kaplan <james.kaplan@kaplanzeena.com>; ferguson@kolawyers.com; Joshua R. Levine <levine@kolawyers.com>
Subject: Re: August rent/residential expenses

I saw my admin leave with the FedEx envelope. Will track it down.

Sent from my iPhone

On Aug 12, 2022, at 8:46 AM, Gaetan J. Alfano <GJA@pietragallo.com> wrote:

Good Morning,

The Receiver has not received this check. Please provide a tracking number.

Thank you.

Gaetan J. Alfano, Esquire

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From: Alan Futerfas <asfuterfas@futerfaslaw.com>
Sent: Monday, August 8, 2022 6:16 PM
To: Gaetan J. Alfano <GJA@Pietragallo.com>
Cc: Noah E. Snyder <noah.snyder@kaplanzeena.com>; James M. Kaplan <james.kaplan@kaplanzeena.com>; ferguson@kolawyers.com; Joshua R. Levine <levine@kolawyers.com>
Subject: Re: August rent/residential expenses

Please be advised that my admin went to Fedex this afternoon to try and get the last pick up for overnight tomorrow. The \$27,173 check is on its way via Fedex.

Alan

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From: "Gaetan J. Alfano" <GJA@Pietragallo.com>
Date: Monday, August 8, 2022 at 1:38 PM
To: Alan Futerfas <asfuterfas@futerfaslaw.com>
Cc: Noah Snyder <noah.snyder@kaplanzeena.com>, James Kaplan <james.kaplan@kaplanzeena.com>, David Ferguson <ferguson@kolawyers.com>, Joshua Levine <levine@kolawyers.com>
Subject: August rent/residential expenses

Good Afternoon Alan,

Please let me know the status of payment.

Thank you.

Gaetan

Gaetan J. Alfano, Esquire

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EXHIBIT 2

From: David L. Ferguson <ferguson@kolawyers.com>
Sent: Saturday, November 19, 2022 2:07 PM
To: James Kaplan <james.kaplan@kaplanzeena.com>; Gaetan J. Alfano <GJA@Pietragallo.com>
Cc: Alan S. Futerfas Esquire (asfuterfas@futerfaslaw.com) <asfuterfas@futerfaslaw.com>; Timothy Kolaya <tkolaya@sknlaw.com>; Noah Snyder <noah.snyder@kaplanzeena.com>
Subject: Re: Follow up

I was just told the HOA payment was mailed out yesterday.

David L. Ferguson

Direct: 954-449-4300



From: James Kaplan <james.kaplan@kaplanzeena.com>
Date: Saturday, November 19, 2022 at 2:03 PM
To: Gaetan J. Alfano <gja@pietragallo.com>
Cc: David L. Ferguson <ferguson@kolawyers.com>, Alan S. Futerfas Esquire (asfuterfas@futerfaslaw.com) <asfuterfas@futerfaslaw.com>, Timothy Kolaya <tkolaya@sknlaw.com>, Noah Snyder <noah.snyder@kaplanzeena.com>
Subject: Re: Follow up

Hi Gaetan-following on David's email I apologize for the delay in response. It was just a very busy week. As you may know, Alan has been tied up with an ongoing criminal trial in New York while Noah and I were consumed with the rule 60 motion.

We will have an answer for you on Monday in order to address the outstanding payments.

Jim

Sent from my iPhone

On Nov 19, 2022, at 1:44 PM, Gaetan J. Alfano <gja@pietragallo.com> wrote:

Thank you.

Sent from my iPhone

Gaetan J. Alfano, Esquire

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On Nov 19, 2022, at 1:41 PM, David L. Ferguson <ferguson@kolawyers.com> wrote:

Gaetan, I am looking into this and will get you a response very soon. David



David L. Ferguson
Partner
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From: Gaetan J. Alfano <GJA@Pietragallo.com>
Date: Saturday, November 19, 2022 at 1:11 PM
To: James M. Kaplan <james.kaplan@kaplanzeena.com>
Cc: Alan S. Futerfas Esquire (asfuterfas@futerfaslaw.com)
<asfuterfas@futerfaslaw.com>, David L. Ferguson <ferguson@kolawyers.com>, Timothy Kolaya <tkolaya@sknlaw.com>
Subject: RE: Follow up

May I please have the courtesy of a response? I do not believe that we have received one.

Thank you.

Gaetan J. Alfano, Esquire

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From: Gaetan J. Alfano <GJA@Pietragallo.com>
Sent: Thursday, November 17, 2022 2:30 PM
To: James M. Kaplan <james.kaplan@kaplanzeena.com>
Cc: Alan S. Futerfas Esquire (asfuterfas@futerfaslaw.com)
<asfuterfas@futerfaslaw.com>; ferguson@kolawyers.com; Timothy Kolaya
<tkolaya@sknlaw.com>
Subject: Follow up

Please advise about the payment of the Haverford rent and the Admirals Cove HOA fee.

Perhaps Mr. LaForte and Ms. McElhone may consider allowing the Receiver to sell or to rent the residences if they are unable to maintain the expenses.

Thank you.

Gaetan J. Alfano, Esquire

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