SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 77

16K04378 October 2, 2017
RUTHERFORD, LANITA vs SMITH, MARY J 8:30 AM

Judge: Honorable Elaine Lu
Judicial Assistant: S. Holman
Courtroom Assistant: M. Miro

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s):Alan Michael Goldberg (Telephonic) ; Eugene Saal in Pro Per; WOLF RIFKIN SHAPIRO SCHULMAN & RABK by: Stephen Levine

For Defendant(s):Alan Frank Broidy ; David Joel Pasternak

NATURE OF PROCEEDINGS: Hearing - Other APPLICATION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; AND FOR PERMISSION TO SUE THE RECEIVER

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

The matter is called for hearing.

After hearing oral argument, the court adopts it's tentative ruling as follows:

The Court terminates the Receiver's duties, effective immediately. Pursuant to the terms of the November 29, 2016, order, Receiver Kevin Singer is ordered to file a noticed motion, within sixty days, regarding submission of a final account, exoneration of the posted bond, and discharge.

The Intervenors' Motion for Leave to File a Complaint-in-Intervention is DENIED as MOOT.

The Receiver's Motion for Order Approving the Loan is TAKEN OFF-CALENDAR.

Background

Plaintiff Lanita Rutherford ("Plaintiff"), a tenant, filed the instant action for breach of the warranty of habitability and negligence on April 6, 2016 against her landlord, Defendants Mary J. Smith and Jeannete Bankhead ("Defendants"), as trustee and successor trustee of the Mary L. Smith Separate Property Trust Dated May 9, 2008, respectively. Plaintiff alleged Defendants failed to keep the property in good working order, resulting in major water damage.

Defendants cross-complained against Tarzana Plaza Condominium Association, Inc. ("Cross-Defendant") on August 29, 2016, alleging negligence, equitable indemnity and contribution, and equitable apportionment. Defendants alleged that Cross-Defendant, the homeowners association responsible for the property, failed to, among other things, repair the roof of the building, and was therefore responsible for the water intrusion in the property owned by Defendants and rented by Plaintiff.

On November 29, 2016, Cross-Defendant filed an ex parte motion "for appointment of receiver and to stay recall election." Cross-Defendant argued: (1) that certain homeowners had filed 19 small claims against the association in the previous three years; (2) that certain homeowners had scheduled recall elections in March and June of 2016, and were planning on holding another election on December 1, 2016; (3) that a prior board had misused $150,000; (4) that the association owed homeowners approximately $30,000 for previously overcharging dues from them; (5) that the association was currently facing a potential $40,000 judgment for indemnification (a reference to the current action); (6) that other homeowners also had claims equal to approximately $35,000 for similar damage; (7) that insufficient homeowners had participated in a September 2016 ballot to charge homeowners a special assessment to raise funds to repair the roof; and (8) that, for all of the foregoing reasons, Cross-Defendant had no money. Based on this, Cross-Defendant requested that a receiver be appointed. As envisioned by Cross-Defendant, once a receiver was appointed "the disgruntled homeowners and others will lose the ability to divert money belonging to the Association, filing frivolous actions against the Association and filing time and resource consuming recall elections, among other things." (Nov. 29, 2016, Ex Parte Application at 6:12-15.)

Simultaneously, Cross-Defendant requested that the Court issue a preliminary injunction enjoining the homeowners from going forward with a scheduled December 1, 2016, recall election. Cross-Defendant had recently written a letter to the inspector of elections hired to run the recall election, objecting to the ballot materials, both because the inspector had certified several candidates to run for the board despite these candidates explicitly failing to meet the requirements of Cross-Defendant's CC&Rs, and because false statements (such as statements limiting which homeowners could vote in the election) were included on the ballots. Because the inspector never responded to Cross-Defendant's concerns, Cross-Defendant felt it had no choice but to seek an injunction preventing that election from going forward.

On November 29, 2016, the court granted Cross-Defendant's ex parte motion. The December 1, 2016, recall election was enjoined. Kevin Singer was appointed as a receiver, and was given

broad powers to hire counsel, manage the property, control all association accounts, and collect dues, including by instituting new assessments against homeowners to help pay for needed repairs. Also on that date, the Court set an OSC re Status of Receiver for March 23, 2017.

The Notice of Order regarding the ex parte motion, along with other required documents such as the Receiver's Oath and the Notice of Filing Undertaking, were served on counsel for Plaintiff and Defendants. Additionally, the Order itself was served on all homeowners on December 1, 2016.

Plaintiff dismissed her complaint with prejudice on December 14, 2016. The suit between Defendants and Cross-Defendant remains.

The OSC Re Status of Receiver, originally set for March 23, 2017, was continued to July 25, 2017. On July 25, 2017, homeowners Eugene Saal, Judy Weiss, Pascal Brenninkmeijer, and Arie Path ("Intervenors") brought an ex parte application (1) for homeowner intervention (if needed); (2) vacating the order appointing Kevin Singer as trustee and appointing a new trustee; or, in the alternative (3) modifying the order appointing Kevin Singer as trustee; or, in the alternative (4) for an order shortening time to hear a noticed motion on the above. Intervenors Judy Weiss and Pascal Brenninkmeijer also brought an ex parte application for an order setting aside the dismissal in Brenninkmeijer v. Tarzana Plaza Condominiums Association, LASC Case No. 17VESC04763 ("Small Claims Action"). The Small Claims Action was apparently dismissed without prejudice on the Receiver's motion and ordered to be heard by this court. Both ex parte applications were denied.

On August 03, 2017, the Intervenors filed a noticed motion for leave to file a complaint-in-intervention. On August 10, 2017, the Court denied the Intervenor's ex parte application to advance the hearing on their motion for leave to intervene. On August 25, 2017, the Court denied the Intervenors' request to enter an order on their stipulation to allow intervention for the purpose of addressing the Receiver's motion to approve a loan.

On August 28, 2017, the Receiver filed a motion for an order approving a loan for $700,000. He simultaneously filed an ex parte application requesting that the Court shorten time to hear the motion. The Intervenors also requested that the Court shorten time to hear their motion for leave to intervene. Both motions were set for hearing on September 25, 2017.

On September 5, 2017, the court partially granted the Intervenors' request for intervention by allowing them to oppose the Receiver's motion, with further briefing regarding the scope of their

intervention to be filed by September 12, 2017. Oppositions to the motion to intervene and motion for loan were also ordered filed by that date, with replies to those motions to be filed by September 19, 2017.[1]

In the opposition to the motion to approve the loan, Intervenors argued the Receiver had never been properly confirmed, and that he therefore lacked any authority to seek a loan. To rebut this, on September 20, 2017, Cross-Defendant filed an ex parte application requesting that the Court confirm the Receiver on an ex parte basis, or, in the alternative, shorten time to hold an OSC re Confirmation. Cross-Defendant acknowledged that no confirmation hearing had been held, despite the requirements of CRC, Rule 3.1176, but argued this was a minor, inadvertent procedural mistake, and that the Court could simply confirm the Receiver based on the ex parte application or confirm him at an OSC.

Ultimately, the Court set an OSC re Confirmation for October 2, 2017, with briefing for each party permitted in the interim. The motion for leave to intervene was also continued to October 2, 2017. The Receiver's motion for an order approving the loan was continued to October 4, 2017. Additional briefing regarding the confirmation issue was also ordered.

Discussion

OSC Re Confirmation

Pursuant to CRC, Rule 3.1176(a), whenever a receiver is appointed on an ex parte basis, "the matter must be made returnable upon an order to show cause why the appointment should not be confirmed. The order to show cause must be made returnable on the earliest date that the business of the court will admit, but not later than 15 days or, if good cause appears to the court, 22 days from the date the order is issued."

Here, there is no dispute that the court did not set or conduct any such order to show cause hearing within 22 days of the appointment of the Receiver on November 29, 2016.

The Intervenors argue this failure necessarily voids the appointment of the Receiver. The Intervenors cite no authority for this proposition. However, one court, in dicta at least, suggested that to be the case:

[T]he [trial] court on December 17, 1937, made an ex parte order appointing H. F. Metcalf receiver as prayed for in said amended complaint, and further ordered that defendants appear

before said court on December 23, 1937, to show cause why said appointment should not be made permanent. The appeal is from [the December 17] order . . . . It does not appear what, if any, action the court took on December 23, 1937, the date fixed for the hearing of the order to show cause why the order appointing the receiver should not be made permanent. If the court on the return day of the order to show cause refused to make the order of December 17, 1937, permanent, then the last-named order would in our opinion fall of its own weight, as a reading of said order would indicate that it was only temporary in character and would only continue until the permanent order was made. . . . However, neither of the parties has presented this point, and each side appears to regard the order of December 17, 1937, as decisive of their rights in the premises; and for that reason we will so consider it, and in the consideration of the issues raised by the parties, we will confine our discussion to the question of the validity of the order of December 17, 1937.

(Baumunn v. Bedford (1941) 18 Cal.2d 366, 368-69.)

Based on the foregoing, an argument can be made that it would be appropriate to terminate the Receiver's duties due to the failure to set an OSC as required by CRC, Rule 3.1176.

Regardless, assuming without deciding that the Receiver's appointment on an ex parte basis was valid despite the lack of a timely OSC, the Court would retain continuing jurisdiction over the more fundamental question, namely, whether the receivership continues to serve a necessary purpose. In Painter v. Painter (1894) 4 Cal.Unrep. 636, 659, for example, the California Supreme Court reprimanded a trial court for permitting a receivership to outlive its usefulness. The Supreme Court noted that, while there might have been sufficient evidence at the ex parte stage justifying appointment of the receiver, the trial court should have realized, after certain evidence was presented at trial, that the receiver was no longer serving a useful purpose. Specifically, the Supreme Court noted that while the receiver was appointed due to irregularities in a company's bookkeeping, later evidence demonstrated the receiver chose to keep using the same bookkeeper, who continued to perform accounting services in the same manner, clearly obviating the need for the receiver.

Other sources likewise emphasize the clear authority of the Court to terminate a receiver's duties when they are no longer necessary. (See, e.g., Hozz v. Varga (1958) 166 Cal.App.2d 539, 544 ["As stated in High on Receivers, 4th ed. 974, 975: '* * * The power of a court of equity to remove or discharge a receiver * * * may be regarded as well settled, and it may be exercised at any stage of the litigation. Indeed, it would seem to be a necessary adjunct of the power of appointment, and to be exercised as an incident to or consequence of that power; * * *'"];

Fairbank v. Superior Court (1917) 34 Cal.App. 66, 73 ["It may at once be conceded that a court will not be justified, through the medium of a receiver, in arbitrarily withholding property from the owner's control and enjoyment for an indefinite and unnecessary period."]; Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (Rutter Guide June 2017 update) § 9:774 ["A receivership terminates upon completion of the duties for which the receiver was appointed; or at any time, upon court order."].)

Based on its review of the initial ex parte application appointing the Receiver, and the current status of Cross-Defendant's finances as made apparent by the Receiver's motion to approve a $700,000 loan, the Court concludes the continued expense of a Receiver, in this case, is more costly than beneficial.

Appointment of a receiver is "an extraordinary and harsh remedy to be allowed cautiously and only where other less onerous remedies . . . would be inadequate or unavailable," (Simmons, 55 Cal. Jur. 3d Receivers § 5 [citing Cohen v. Herbert (1960) 186 Cal. App. 2d 488; Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869; Breedlove v. J.W. & E.M. Breedlove Excavating Co. (1942) 56 Cal. App. 2d 141]) "A receivership is a harsh, time-consuming, expensive and potentially unjust remedy and thus is available only where a more 'delicate,' alternative remedy (i.e., injunction, writ of possession, attachment, provisional director, lis pendens) is inadequate. In other words, it should not be requested unless absolutely essential because no other remedy will do the job." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (Rutter Guide June 2017 update) § 9:743 [citing City & County of San Francisco v. Daley (1993) 16 Cal.App.4th 734].)

In essence, Cross-Defendant sought the appointment of a receiver because it was out of money. It is, frankly, rather unusual for a party to seek to put itself in a receivership. (See, e.g., Simmons, 55 Cal. Jur. 3d Receivers §3 [noting that receiverships are generally used when "it does not seem reasonable to the court that the party in possession [of disputed property] can be entrusted" with maintaining the property].)

In any event, the ex parte appointment of a receiver on November 29, 2016 was always meant to be temporary. Although the Court did not set an OSC for 15 or 22 days after the ex parte application was granted, the court did schedule an OSC re Status of Receiver for four months later, on March 23, 2017. Though this OSC was continued and, ultimately, buried due to the voluminous filings in this case, the intent of the Court to evaluate the efficacy of the Receiver was clear from the outset.

The Receiver now informs the Court that, ten months after his appointment, Cross-Defendant remains unable to pay its debts and liabilities without taking out significant loans. While the Court does not fault the Receiver for Cross-Defendant being in this situation—clearly, the situation was already dire when the Receiver was appointed—the Court concludes the Receiver's continued involvement in this case will merely serve to drive up Cross-Defendant's debts even further.

This is particularly true because Cross-Defendant, even without any receiver, is already empowered to engage in the acts the Receiver was appointed to do. Cross-Defendant's CC&R's (attached as Exhibit 3 to the Intervenor's July 25 ex parte application) gives Cross-Defendant powers over elections (Art. IV), assessments (Art. VI), and internal dispute resolution (Art. XIV), all issues that Cross-Defendant cited, in the ex parte application, as reasons for Cross-Defendant's ballooning debts. Moreover, if these currently enumerated powers are insufficient, then new provisions may be added by amendment. (Art. XIII).

The Court is sympathetic to the arguments made by Cross-Defendant's counsel, at the hearing, regarding the difficulty of solving the serious problems facing Cross-Defendant without a receiver, especially when faced with consistent opposition from certain homeowners. Operating as a homeowner's association board, subject to these CC&R's, is almost certainly slower, more frustrating, more difficult, and more inefficient than handing over all power to a receiver. Nonetheless, this inefficient, yet democratic, process is the process the homeowners bargained for when they created a homeowner's association in the first place. Working through the inefficient process would also seem to be far less expensive than continuing to rely upon a receiver, which should be of some importance to Cross-Defendant given the current status of its debts.

At the hearing, Cross-Defendant placed particular emphasis on the need to obtain a loan. Cross-Defendant represented that if the Receiver could just remain in place for six more months, in order to obtain and begin using the loan to make necessary repairs and replenish Cross-Defendant's accounts, then the Receiver could step aside.

Again, while the Court is sympathetic to Cross-Defendant's current circumstance, the same issues discussed above, regarding operating Cross-Defendant generally, apply even more clearly to the specific issue of obtaining a loan. For example, Cross-Defendant already has procedures in place for obtaining money when funds are lacking. As Cross-Defendant itself indicated in its original ex parte application, it attempted to raise funds as permitted by the CC&R's last year: "In September 2016, the Association sent out a ballot for a vote for a special assessment to raise

funds to replace the roof. . . . [S]ufficient ballots were not received, and, therefore, there was no quorum and the special assessment did not pass." (Nov. 29, 2016, Ex Parte Application at 2:24-3:8.) The homeowners' disinclination to participate in the proper process does not alter the fact that a proper process exists. It is not the role of the Court—especially in litigation only tangentially related to the governance of Cross-Defendant—to supplant the homeowners' opinions for its own, forcing them to do what the Court, through its imposed Receiver, thinks is best. Especially where the homeowners were hesitant about approving a special assessment to repair the roof—which the Receiver currently estimates would cost $163,500 (Motion to Approve Loan, Exh. 2)—it seems highly inappropriate for the Court to now let a receiver override that hesitance by obtaining a $700,000 loan.

Moreover, given that Cross-Defendant requested a receiver largely because of Cross-Defendant's financial difficulties, taking on massive new liabilities in the form of the aforementioned loan seems at least somewhat counterintuitive to solving Cross-Defendant's problem. Certainly, the Court does not say one way or the other whether a loan is the best way to solve Cross-Defendant's problem. However, it is the homeowners themselves, not the Court or its Receiver, that should be weighing the pros and cons of this potential solution.

Finally, the Court notes that, to the extent Cross-Defendant believes it needs help pulling itself out of the instant straits, nothing would prohibit Cross-Defendant from hiring a new manager, accountant, or outside consultant to fix its problems. Given the immense costs of a receiver, the Court considers it unhelpful to impose such payments on Cross-Defendant any longer. However, if Cross-Defendant feels the costs are worth it, the homeowners can make their own decision about hiring such an individual. At the hearing, Cross-Defendant suggested this was not an option, because unlike a court-appointed receiver, a hired manager would not have quasi-judicial immunity and would be exposed to suits from unhappy homeowners. Yet it seems to the Court that it would be a massive expansion of the "extraordinary" power of receiverships—and a recipe for abuse—if the Court appointed a receiver every time an entity wanted to clothe itself or one of its actors in immunity.

Ultimately, this Court is not a bankruptcy court. It did not intend, and is not now willing to permit, the Receiver to operate indefinitely. Accordingly, the Court terminates the Receiver's duties and powers, as outlined in the November 29, 2016 order, effective immediately.

This order should in no way be construed to relieve the Receiver of ¶ 5 of the Court's November 29, 2016 order, which provision is essentially a restatement of the requirements outlined in CRC, Rule 3.1184 regarding the Receiver's final account and report. Specifically, the Court's

November 29, 2016, order, states, "Not later than sixty (60) days after the receivership terminates the Receiver shall file, serve, and obtain a hearing date on a motion for discharge of the Receiver." (Nov. 29, 2016, Order, ¶ 5(b).) Specifically, the motion is to seek "approval of the Receiver's final report and account and exoneration of the Receiver's bond." (Id. at ¶ 5(a).) The Receiver should reserve a hearing date on the online Court Reservation System (CRS) for this motion and timely file and serve his final account, report, and motion on all parties who have appeared in this action, including the proposed intervenors.

In fulfilling this requirement, the Receiver is authorized to use counsel. The Court notes that, prior to the hearing on these matters, the Intervenors objected to the Receiver's use of counsel in opposing their motion for intervention. The Intervenors argued such use extended beyond the permission afforded the Receiver, pursuant to ¶ 3(a) of the Nov. 29, 2016, order, to hire attorneys "to aid and counsel the Receiver in performing his duties." Instead, the Intervenors argue the Receiver was required to obtain leave of the Court to hire counsel pursuant to CRC, Rule 3.1180.

It is the Court's understanding that this objection was withdrawn at the hearing. To the extent it was not withdrawn, it is OVERRULED. The Court concludes ¶ 3(a) of the order was sufficiently broad as to permit the Receiver to rely on an attorney in briefing and appearing at the matters before the Court on October 2, 2017.

Notwithstanding the foregoing, it is the Court's understanding that Alan Goldberg, counsel for Intervenors Pascal Brenninkmeijer and Arie Pathi, objected to the Receiver's use of counsel going forward for anything other than the requisite motion to discharge his duties. The Court concludes that whether the Receiver relies on his attorney for anything other than "aid and counsel . . . in performing his duties," including the filing of the motion to discharge, between now and whenever that motion is heard, should be addressed at that point in time, rather than preemptively in this order.

Having removed the Receiver, the Court orders that the board members, as they were situated prior to the Receiver's appointment, resume governing Cross-Defendant. The Court denies the Intervenors' request that they be provisionally appointed to the board. Elections to the board are to go forward as they normally would, pursuant to all relevant CC&Rs and laws. To the extent the Court's November 29, 2016 order granting a preliminary injunction has been read to apply to all recall elections, rather than solely the December 1, 2016 recall election, the injunction is lifted.

Finally, the Court notes that, to the extent governance problems persist, Cross-Defendant is free

to avail itself of the judicial system to resolve any disputes. For example, if some future recall election again appears to fail to adhere to Cross-Defendant's governing rules, Cross-Defendant is free to request a preliminary injunction as to that election. This limited civil action, however, which is addressed solely to the dispute between Defendants and Cross-Defendant, is not the proper venue for such a request.

Motion for Leave to File Complaint-In-Intervention

Pursuant to the agreement of all moving parties at the hearing, the Intervenors' motion for leave to file a complaint-in-intervention is DENIED as moot.

Motion for Leave to Approve a Loan

Given the termination of the Receiver's powers, the Court TAKES OFF CALENDAR the Receiver's motion for an order approving the loan. Cross-Defendant is, of course, free to pursue taking out a loan on its own, in accordance with the CC&R's and other rules governing such an action.

Clerk is to give notice to Cross-Defendants who are to give notice to all parties who have appeared in this action, including the proposed intervenors.
Certificate of Mailing is attached.