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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. DeGrasse PART 25
Justice

Premier Capital
- v -
Duncan Realty Corp. et al

INDEX NO. 103683/96

MOTION DATE 7/12/00

MOTION SEQ. NO. 15

MOTION CAL. NO. 83

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ✓ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

MAR 05 2001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____

J.S.C.

Dated: 3/5/01

J.S.C.

Check one: ☐ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

- X

PREMIER CAPITAL AS THE ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CAPITAL NATIONAL BANK OF NEW YORK,

Plaintiff,

-against-

DAMON REALTY CORP., MARIA PORTES, CARLOS P. PORTES, C.P. PORTES ASSOCIATES, INC. NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, et al.

Defendants.

Index No.: 103683/96

Cal. No.: 83 of 2/14/01

- X

DeGRASSE, J.:

The temporary receiver in this foreclosure action moves to hold in civil contempt defendant Damon Realty Corp., ("Damon") and its president, defendant Carlos P. Portes ("Portes"). The receiver alleges that these defendants failed to transmit to the receiver certain rents they obtained from tenants at the commercial building that this the subject of this action, 5037-5043 Broadway in Manhattan ("the building"). The receiver alleges that this failure to attorn was in derogation of this court's November 19, 1999 Order appointing the receiver.

The receiver also brings a second motion he styles as a "cross-motion" against the plaintiff, Premier Capital ("Premier"), seeking an order from this court 1) compelling Premier to cover insurance and security costs for the now-vacant building, "and further requiring plaintiff mortgagee to fund and pay for the Receiver's fees and/or commissions and his counsel fees," or alternatively, 2) fixing the fees and/or commissions of the

receiver based on alternate theories, and 3) fixing the legal fees of the receiver's counsel.

The receiver's description of his second motion as a "cross-motion" is a misnomer as CPLR 2215 does not provide that a litigant may cross-move against himself. (See CPLR 2215.) To allow a party to characterize a second motion as a cross motion, thereby allowing that party the much shorter time for service provided by CPLR 2215, could result in prejudice to the responding party. However, while the receiver initially did not provide sufficient time for Premier to respond to the cross motion, he subsequently agreed to a two-week extension for Premier's response. Accordingly, this second motion complies with the time frames specified in CPLR 2214. As there has been no showing of prejudice and in the interests of judicial economy the court will treat the "cross motion" simply as a second motion.

FACTS

It appears that the building was occupied until recently by Portes and several companies controlled by him. Portes, Damon and Portes' spouse Maria Portes all apparently entered into mortgage guaranties with a prior mortgagee. As a result of Damon's default on its mortgage payments, Premier's predecessor in interest brought this foreclosure action in 1996.

The current receiver was appointed by the November 1999 Order pursuant to RPL § 254(10), RPAPL § 1325(1), and CPLR 6401. The November 1999 Order provides, inter alia, that the receiver

shall collect the rents, issues and profits of the building, and, among other powers, allows him to pay taxes on the building, obtain insurance for the building, and bring suit to collect rents or remove tenants "and employ counsel for that purpose." The Order also provides in relevant part:

> ORDERED that any tenant(s) licensees, occupants or other person(s) in possession of such Premises attorn to said temporary receiver and pay over to said temporary receiver all rents, license fees, profits and other charges of such premises now due and unpaid, or that may hereafter become due; and that the defendants be enjoined and restrained from collecting the profits, rents and license fees and other charges for such Premises and from interfering in any manner with the property in the receiver's possession; ... and that all tenant(s), occupants, employees and licensees of the Premises and other person(s) liable for the rents be and hereby are enjoined from paying any rent, license fees, profits, or other charges for such Premises to the defendants, their agents, servants or attorneys ... .

The receiver met and corresponded with Portes several times beginning in January 2000. However, after an initial payment of $6000, the mortgagor has never paid any rent for use and occupancy of the building.

The receiver moved this court for an order setting the fair market use and occupancy of the premises. The court referred this motion to a referee to hear and report and by order dated August 11, 2000 confirmed the referee's findings that fair rent for the building was $16,666.66 per month, and that the fair rent for the parking places situated on the property was $1680 per month.

Both of these rental figures were retroactive to January 1, 2000.

Based on this order, the receiver retained counsel experienced in landlord/tenant matters to serve demands on Portes and his various companies. Counsel subsequently initiated nonpayment proceedings in Civil Court.

These proceedings were delayed by Damon's bankruptcy filing on October 5, 2000. The receiver successfully moved the bankruptcy court for an order liftng the automatic stay. The receiver's papers state that the motion to lift the stay was heard on November 16, 2000, but do not reveal the date that the bankruptcy court lifted the stay.

The nonpayment proceeding subsequently resumed and ended in a judgment of approximately $214,000 against Damon, Portes, C.P Portes Associates, and Maria Portes. The court also issued a warrant of possession in favor of petitioner. Portes and his various business entities were evicted from the premises in late January of this year.

In the course of appearing in the bankruptcy proceeding the receiver discovered that Damon had claimed that it had received and retained rent from various tenants in the building. Damon's bankruptcy filings reflect that it received a total of $14,600 in rent for the months of October and November 2000. The receiver seeks an order holding Portes and Damon in civil contempt for their failure to turn this rent over to plaintiff.

DISCUSSION

A. The Contempt Motion

The elements of civil contempt are set forth in McCormick v. Axelrod, 59 NY2d 574, 583:

> In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. (Citations omitted.) Moreover, the party to be held in contempt must have had knowledge of the court's order... . Finally, prejudice to the right of a party to the litigation must be demonstrated.

A receiver, while not a party, is an agent of the court who has standing to bring a contempt motion to enforce the court's orders. (See Harris Investing Corp. v Sil-Gold Corp., 38 Misc2d 549; 13 Weinstein, Korn & Miller New York Civil Practice, ¶ 6401.17.)

All the elements of civil contempt are satisfied here. The court's November 1999 Order was lawful and unequivocally mandated that defendants hand all rents over to the receiver. Defendants do not deny that they had knowledge of the November 1999 Order, which was served on them and their counsel. Nor do defendants deny what Damon's Bankruptcy filings show, that rents in the amount of $14,600 were paid by various tenants in the building for the months of October and November 2000. It is undisputed that defendants did not hand these rents over to the receiver.

The failure to attorn these rents has clearly prejudiced Premier, as the money could have been applied by the receiver to

pay for various costs incurred in maintaining the building. In the absence of any rent save defendant's initial payment of $6000, Premier has had to pay out of its own pocket for back taxes and insurance. Additionally, the lack of rent paid into the receivership has compromised the receiver's ability to pay himself for the services he has performed and the expenses he has incurred. As discussed at greater length below, at the close of the receivership Premier may have to pay the expenses incurred by the receiver pursuant to CPLR 8004(b) if the rents owed by defendants are not recovered or the premises are not re-let to new tenants.

Defendants' arguments in opposition to the contempt motion are without merit. In his affidavit Portes admits that he collected the rents, but argues that he "retained the net rents by reason of being a stakeholder of the monies that might belong to either the [Bankruptcy] Trustee or the Receiver." During the course of the bankruptcy stay, it could be argued that this court's November 1999 Order was not in "effect," and thus could not give rise to a civil contempt motion. However, this argument ceased to have any force after the bankruptcy stay was lifted.

Defendants also argue that the contempt motion should be denied because they were not properly served with the motion papers. However, the receiver has demonstrated that defendants were personally served in accordance with the court's directions contained in the order to show cause bringing on the motion.

Accordingly, the receiver is entitled to an order of holding defendants Damon Realty Corp. and Carlos P. Portes in

contempt. The order shall provide that defendants may purge themselves of contempt by accounting to the receiver for all rents they collected at the building after January 1, 2000 and attorning all such rents to the receiver.

B. The Receiver's Motion Against Premier

Defendants' failure to pay rents to the receivership has left the receivership with little money. When defendants were finally evicted from the building, it became clear that the now-vacant building would require insurance and security, as well as other incidental services such as attention to the building's water and heating systems. The purchase of insurance alone probably would have severely depleted the approximately $5700 that remains in the receivership account.

Unfortunately, the need to expend funds to maintain the vacant building led to acrimony between the receiver on the one hand and Premier and its counsel on the other. The two sides have accused each other of not taking sufficient steps to protect the building. Whatever working relationship that existed between the two sides has deteriorated badly.

In the wake of these disputes, the receiver brought his second motion, seeking to force Premier to fund the receivership sufficiently to allow for the purchase of insurance and security, and to ensure the payment of the receiver's commissions and expenses.

Insofar as the motion seeks to compel Premier to purchase

insurance it is moot. Premier has done so.

With respect for the need to purchase security and take other steps to secure the building, such as ensuring that the alarm system is working and that the building's pipes will not burst in the cold of winter, the receiver has failed to demonstrate that the funds currently in the receivership are inadequate to cover these costs. Accordingly, the motion to compel Premier to fund the receivership to cover these costs is denied.

Finally, the receiver has not cited -- and the court has not found -- any authority that supports his motion to compel Premier to fund the receivership to cover the costs of the receiver's commissions and expenses incurred to date. In general, a receiver is compensated at the end of a receivership. (Amusement Distributers, Inc. v Oz Forum, 113 AD2d 855, 14 Weinstein, Korn & Miller, New York Civil Practice, ¶ 8004.01.)

While in a protracted and complex proceeding, a court may provide for interim allowance to a receiver (see 13 Weinstein, Korn & Miller New York Civil Practice, ¶ 6401.15; Arenstein v Huston, 142 Misc2d 491), the receiver has failed to make such a showing here. First, after Premier's purchase of insurance, there appear to be adequate funds on hand to handle any immediate expenses of the receivership.[1] Second, Premier has taken issue with some of the expenses, and with the efficacy, of the receiver's actions.

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[1]Counsel fees might be an expense justifying an interim payment. However, the number of hours worked by the receiver's counsel, his customary rate, and a detailed description of the work he performed do not appear in the record.

The receiver's statement of the time and amounts he has expended so far was not timely served on Premier, so Premier did not have the opportunity to examine the receiver's statement of the amounts due him before the motion was fully submitted. Accordingly, the court cannot evaluate the parties' conflicting contentions regarding the value of the work performed by the receiver and the expenses incurred by him.

Finally, the receiver's earned commissions (exclusive of expenses) to date amount to a maximum of $300 under CPLR 8004, which amount is covered by the funds currently in the receivership account.

That the receiver is currently entitled to such a small commission despite the extensive work he has apparently performed for the receivership arises from an anomaly contained in CPLR 8004.

Pursuant to CPLR 8004(b) a receiver is entitled to

> such commissions, not exceeding 5 per cent, upon the sums received and disbursed by him, as the court by which he is appointed allows, but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding 100 dollars, as shall be commensurate with the services he rendered.

In other words, a receiver's commission is limited to a maximum of five percent of the moneys he collects, or $100 where this five percent rate would yield a commission below $100. (Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Semerjian, 232 AD2d 448; Eastrich Multiple Investor Fund, L.P. v Citywide Dev. Assocs., 218 AD2d 43.)

Where there are no funds left in the receivership at its termination, the party who obtained the appointment of the receiver may in "special circumstances," be required to pay the expenses and commissions of the receiver pursuant to CPLR 8004(b). However, courts and commentators interpreting CPLR 8004(b) and its legislative history have held that as long as the receiver has collected some funds, his commissions (as distinct from his expenses) are to be determined according to 8004(a). (Amusement Distributers, supra, 113 AD2d at 857; Weinstein, Korn & Miller, New York Civil Practice, ¶ 8004.9; Bergman, Appointing and Paying Receivers in the Mortgage Foreclosure Action, New York State Bar Journal, January 1990 at 41.) Courts have so held despite the "anomalous" result that a receiver who collects no money may be compensated on a quantum meruit basis under 8004(b), while a receiver who collects a small amount of money receives commissions according to the formula provided in 8004(a) - which may result in a smaller commission than a quantum meruit award. (Compare 515 East 12th Street Associates v Gentile, 160 AD2d 187 with Amusement Distributers, supra, 113 AD2d at 857; see 1 Bergman, Bergman on New York Mortgage Foreclosures, § 10.16 [noting "patent infirmity" of statute].)[2]

Here the receiver has posited two alternate ways to calculate his commissions to date, and asks that Premier be

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[2]The only state case holding otherwise, Klemczyk v Levin (144 Misc2d 124) contains no analysis in support of its rejection of the commission formula provided in CPLR 8004(a). Accordingly, the court finds that it is not persuasive.

compelled to pay into the receivership amounts sufficient to cover these amounts. The first method posits that the receiver is entitled to a percentage amount of the rents he would have received had defendants paid rent at the fair market value set by the court. The second method is based on the receiver's normal hourly billing rate as an attorney. The receiver cites no authority for compensating him using either of these measures and the court could not find such authority. As noted above, a receiver's commissions are limited to a maximum of 5 percent of the amounts that come into his hands. (Eastrich Multiple Investor Fund, L.P. v Citywide Dev. Assocs., 218 AD2d 43.) Moreover, even if the amounts claimed by the receiver in his motion were due him he has not demonstrated why they must be paid into the receivership account now.

Obviously, the receiver and Premier both have an interest in funding the receivership. The receiver needs to ensure that his commissions come to reflect the amount of work that he asserts he has expended on the receivership. Premier needs to ensure that it will not be forced to pay the compensable expenses incurred by the receiver during the course of the receivership. Accordingly, it is in both their interests to cooperate in seeking to enforce the judgments obtained against defendants in housing court and in this court and in seeking to re-let the property. Two or three months' rent at the fair market level would enhance the receiver's commissions and just about cover his claimed expenses, including the fees of his counsel.

CONCLUSION

The motion of the receiver to hold defendants Damon Realty Corp. and Carlos P. Portes in contempt is granted.

The motion of the receiver that seeks an order from this court 1) compelling Premier to cover insurance and security costs for the now-vacant building, "and further requiring plaintiff mortgagee to fund and pay for the Receiver's fees and/or commissions and his counsel fees," or alternatively, 2) fixing the fees and/or commissions of the receiver based on alternate theories, and 3) fixing the legal fees of the receiver's counsel, is denied.

Settle Order.

DATE: MAR 05 2001

J.S.C.