

**D.B. Zwirn Special Opportunities Fund, L.P. v Tama
Broadcasting, Inc.**

2008 NY Slip Op 32113(U)

July 21, 2008

Supreme Court, New York County

Docket Number: 0600692/2008

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.

INDEX NO. 600692/08

- v -
TAMA BROADCASTING, INC., ET AL.

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

affirmed

is decided as

FILED
JUL 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/21/08

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 17

-----X
 D.B. ZWIRN SPECIAL OPPORTUNITIES FUND,
 L.P.,

Plaintiff,

Index No. 600692/08

-against-

TAMA BROADCASTING, INC. TAMA
 RADIO LICENSES OF TAMPA FLORIDA,
 INC., and TAMA RADIO LICENSES OF
 JACKSONVILLE, FLORIDA, INC.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Plaintiff, a hedge fund, moves by Order to Show cause for the appointment of a Temporary Receiver, pursuant to provisions in a Financing Agreement and an Amended Financing Agreement (the financing agreements) providing for appointment of a Receiver.¹ The collateral that is the subject of this action includes licenses for nine radio stations in Florida and Georgia, which play Smooth Jazz, Urban and Christian Contemporary music. Defendant TAMA Broadcasting, Inc. (TAMA), in its first attempt to delay this 40 million dollar breach of contract action, removed the action to Federal Court, where it was assigned to Honorable Shira Scheindlin. Although Hon. Scheindlin ultimately remanded the action to this Court for lack of federal subject matter jurisdiction,

¹With all the litigation related to this action, the attorney time invested, and the large amount of paper submitted by the parties, it would be reasonable to expect that the financing agreements would be separately tabbed and clearly identified to the Court-which they were not.

she was “struck by Tama’s attempts to delay the efforts made first by the state court and now by this Court to reach the merits of this case” and “sympathize[d] with plaintiff’s frustrated desire to have this case promptly proceed to the merits.”² Accordingly, she took the unusual step of issuing a decision for this Court’s “guidance.”³

Control Dispute

Subsequent to the submission of the motion, this Court has received a “Stipulation and Order Pursuant to CPLR 6401 Appointing a Temporary Receiver” (the Stipulation) signed by Vison & Elkins, L.L.P., attorneys for Plaintiff, and, Braverman & Associates, attorneys for “Defendants.” However, Percy Squire Co., LLC also purports to represent “Defendants” and objects to the appointment of a Temporary Receiver. Percy Squire was originally retained by Dr. Glenn Cherry on behalf of TAMA. However, it has been alleged that at a meeting on May 20, 2008, the majority of the TAMA board voted to appoint Ted Bolton as TAMA’s new Chief Executive Officer, in place of Dr. Glenn Cherry, and to terminate Percy Squire’s employment and hire Braverman & Associates, P.C. Apparently, an intense and hostile control dispute had arisen between the Cherry family and other members of the TAMA board, which is the subject of litigation in

²In her decision, she also noted that TAMA attempted to delay the proceeding before her by maintaining that an evidentiary hearing was required (which has also been argued here, but is rejected as not required given the lack of materially disputed issues), even though TAMA had previously stated a hearing was not needed.

³Considering this Court’s respect for the source, the guidance is greatly appreciated. The Court, however, makes its own independent determination herein.

Florida.⁴ However, this control dispute needed not be resolved in order for this Court to render a decision. Assuming that it is ultimately determined that the Cherry family is not entitled to exercise any control over TAMA, then the parties have consented to the Temporary Receiver by Stipulation. If it is found that the Cherry family is ultimately entitled to control TAMA, their objections, raised by the attorney Percy Squire, do not prevent the appointment of the Temporary Receiver.⁵ These objections fall essentially into two categories: (1) that the collateral is not in imminent danger of being lost or diminished in value and (2) that the Court should not appoint a Temporary Receiver but defer the matter to the FCC, under the doctrine of primary jurisdiction doctrine, and deny appointment as a violation of Section 310 (d) of the Communications Act.⁶

⁴TAMA and its various entities brought a lawsuit against Plaintiff in the Circuit Court Fourth Judicial, Circuit Nassau County, Florida seeking restraining orders and injunctions based on Plaintiff's purported attempt to unlawfully usurp control of their radio stations, in violation of Article 9 of the Uniform Commercial Code and the Communications Act. A case was also filed by TAMA against defendants including the Cherrys, in the Circuit Court of Thirteenth Judicial Circuit, Hillsborough County, Florida. In that case, Justice Nielsen issued an *ex parte* temporary order providing that Glenn W. Cherry and Charles Cherry had no authority to act on behalf of TAMA, and had to defer to Dr. Ted Bolton. He further found that the Cherrys had locked out TAMA from certain radio stations and interfered with the business. Subsequent to that order, defendants therein removed the case to United States District Court in Tampa, but the action was remanded back to Justice Nielsen. However, the Cherrys have indicated that they intend to correct any deficiencies and remove the case again. Another suit was filed against Plaintiff in the United States District Court, Middle District of Florida, Jacksonville Division.

⁵By Decision and Order, dated May 29, 2008, Percy Squire was admitted *pro hac vice* to "represent the interests of the Cherrys who purport to represent Defendants, until further order of the Court." The Court also grants Plaintiff's application for *pro hac vice* admission of Gregory Masters, Esq. as Plaintiff's FCC counsel.

⁶Percy Squire makes certain other arguments in an effort to prevent appointment of the Temporary Receiver, which are not discussed herein, but which are unpersuasive.

Standards for Appointment of a Receiver

Appointment of a Temporary Receiver is appropriate here. First, although not determinative, the financing agreements themselves provide for appointment of a receiver upon the occurrence of events of default, and it undisputed that Defendants have defaulted on loan obligations, although the specific amount is disputed.

Second, this Court finds that “the actions of the various antagonists threaten the well being and continued viability” of Defendants (Modern Telecommunications, Inc. v DALlesandro (185 AD2d 218 [1st Dept 1992]; see also Rosan v Vasell, 257 AD2d 436 [1st Dept 1999] [appointment of temporary receiver was proper in “light of the compelling evidence of a struggle within the subject corporation threatening its continued viability”]). Although Dr. Glenn Cherry states that he believes a payment plan can be arranged, it is undisputed that Defendants have not paid property taxes and that the County of Duval, Florida has indicated that if taxes are not paid, assets would be seized. It is further undisputed that rent for certain radio stations and a station tower are past due, although Dr. Glenn Cherry argues that Plaintiff is responsible for such payments. Notably, the rent due is owed to a landlord (Group Assets, LLC) in which the Cherrys have an interest (Plaintiff claims that the rental amount is inflated).⁷ Plaintiff also argues that Defendants’ failure to pay a business which provides ratings for radio stations used in determining the value of advertising time, endangers the collateral, although Dr. Glenn

⁷The letterhead of Group Assets, LLC is “C/O Charles W. Cherry II” who is listed as a Managing Member.

Cherry maintains that a portion due is owed by Plaintiff. Most notably, it is undisputed, WTMP-FM and WTMP-AM were running in a continuous loop with no new programming for at least two weeks in May, 2008. Judge Scheindlin, who was also presented with much of the evidence proffered here, believed that there was “imminent danger of Tama’s property continuing to diminish in value.” This Court finds that the motion should be granted based on the aforementioned undisputed evidence, in conjunction with the clearly hostile relationship between the Cherrys (who have litigated aggressively in both State and Federal courts) and the other individuals who claim to control Defendants, as well as the Cherry family’s hostile relationship with Plaintiff, who they claim is exerting “illegal efforts to control Tama’s programming,” all leading to dysfunctional businesses and imminently threatening to diminish the value of the collateral.

FCC Jurisdiction and Section 310 (d) of the Communications Act

Despite the fact that TAMA signed the financing agreements which contemplate appointment of a Receiver, who will act in cooperation with the FCC and seek FCC consent where required, Percy Squire maintains that this Court should defer to the FCC under the doctrine of primary jurisdiction doctrine and deny appointment of a receiver because the appointment violates Section 310 (d) of the Communications Act. That section provides that “[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or

license, to any person except on application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby” (47 USC §310 [d]).

However, the doctrine of primary jurisdiction is inapplicable because the appointment of a receiver does not involve agency expertise (see State of New York v Port Distributing Corp., 114 AD2d 259, 267 [1st Dept 1986] [courts do not automatically apply the doctrine of primary jurisdiction simply because the controversy involves an administrative agency if there is no need for specialized agency expertise]). The appointment, which was specially contemplated by those persons now objecting to it, does not violate Section 310 (d). Temporary Receivers have been appointed to control radio station licenses upon loan defaults and it has been held that such appointments do not violate FCC policy or federal law (see e.g., MLQ Investors, L.P. v Pacific Quadracasting, Inc., 146 F3d 746 [9th Cir 1998]; Phoenix Leasing Inc. v Sure Broadcasting, Inc., 1996 WL 219608 [9th Cir 1996]). Defendants have not cited any cases to the contrary. This Court reads Section 310 (d) as permitting the appointment of a Temporary Receiver so long as that person applies forthwith to the FCC for all requisite FCC approvals, including, should the FCC deem necessary, approval or rejection of the appointment of the Temporary Receiver. However, the Court lacks the resources or expertise to identify a suitable, willing individual to serve as Temporary Receiver and has no ability to evaluate the background or credentials of the one proposed by Plaintiff.

While the office of Court Administration maintains a list of approved fiduciaries, none appears to have the knowledge necessary to undertake this appointment.

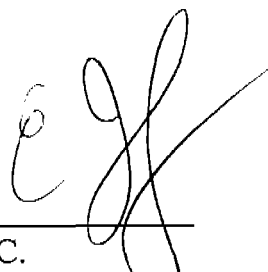
It is hereby

ORDERED that Plaintiff provide to the Court, forthwith, and on notice to all counsel, a proposed order of appointment in conformity with this Decision and Order, as well as an affidavit from the proposed Temporary Receiver detailing his background and relevant personal history, including any criminal history.

This Constitutes the Decision and Order of the Court.

Dated: July 21, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED