

FILED

MAY 21 2012

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of California, County of Santa Clara
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

WACHOVIA BANK, NATIONAL
ASSOCIATION,

Plaintiff,

vs.

DOWNTOWN SUNNYVALE RESIDENTIAL,
LLC, et al.,

Defendants.

Case No. 1-09-CV-153447

Related Case No. 1-11-CV-213485

ORDER RE: FINAL ACCOUNT AND
REPORT, REQUEST FOR APPROVAL
OF FEES, EXONERATION OF BONDS,
AND DISCHARGE OF ALL CLAIMS
AGAINST THE RECEIVERSHIP ESTATE
AND RECEIVER

AND RELATED CROSS-ACTION.

The final account and report, request for approval of fees, exoneration of bonds, and discharge of all claims against the receivership estate and receiver by court-appointed receiver L. Gerald Hunt came on for hearing before the Honorable Peter H. Kirwan on May 17, 2012, at 2:00 p.m. in Department 8. The matter having been submitted, the court orders as follows:

The request for judicial notice in opposition to receiver L. Gerald Hunt's final account and report, request for approval of fees, exoneration of bonds, and discharge of all claims against

1 the receivership estate and receiver, and brief thereon (“Opposition RJN”) is GRANTED, but
2 only to the extent that the court takes judicial notice of the existence of the documents, not
3 necessarily the truth of any matters asserted therein. (See Evid. Code, §452, subd. (d); *People v.*
4 *Woodell* (1998) 17 Cal.4th 448, 455.)

5 The request for judicial notice in support of receiver’s reply on his final account and
6 report, request for approval of fees, exoneration of bonds, and discharge of all claims against the
7 receivership estate and receiver is GRANTED, but only to the extent that the court takes judicial
8 notice of the existence of the documents, not necessarily the truth of any matters asserted therein.
9 (See Evid. Code, §452, subd. (d); *People v. Woodell* (1998) 17 Cal.4th 448, 455.)

10 California Rules of Court, rule 3.1184, subdivision (a) states, “A receiver must present by
11 notice motion or stipulation of all parties: (1) a final account and report; (2) A request for
12 discharge; and (3) A request for exoneration of the receiver’s surety.” “The amounts to be
13 allowed to the receiver as his compensation and to pay his attorney are for the trial court to
14 determine in the exercise of its discretion.” (*Macmorris Sales Corp. v. Kozak* (1967) 249
15 Cal.App.2d 998, 1005 (*Macmorris*).

16 “A receiver cannot be held liable as a tortfeasor for an act done within the scope of the
17 powers granted by the order of the court. [Citation.]” (*Shannon v. Superior Court* (1990) 217
18 Cal.App.3d 986, 993 (*Shannon*)). That being said, “A receiver is not immune from
19 responsibility for his or her acts.” (*Ibid.*) “It is of course an indispensable part of the receiver’s
20 duties to file an accounting and submit himself to inquiry and attack by those beneficially
21 interested in the estate.” (*Macmorris, supra*, 249 Cal.App.2d at p. 1005.) “[U]pon the receiver’s
22 final report and account, the receiver in his personal capacity may be surcharged for losses to the
23 receivership estate based upon his misconduct or mismanagement. Notice of the receiver’s final
24 report and account is given to all interested parties. [Citation.]” (*Aviation Brake Systems, Ltd. v.*
25 *Voorhis* (1982) 133 Cal.App.3d 230, 235.) “[A] receiver, as any fiduciary, may be surcharged
26 and his or her surety held liable for a failure to properly carry out the duties imposed by the order
27 of appointment.” (*Shannon, supra*, 217 Cal.App.3d at p. 993.)

1 Based on these guiding legal principles, the court must determine whether the receiver
2 here ought to be surcharged. To make this determination, the court must look to the order
3 appointing the receiver and subsequent orders issued by this court authorizing the receiver’s
4 actions. “The receiver has, under the control of the court, power . . . to take and keep possession
5 of the property, to receive rents, collect debts, to compound for and compromise the same, to
6 make transfers, *and generally to do such acts respecting the property as the court may*
7 *authorize.*” (Code Civ. Proc., §568; emphasis added.)

8 Here, the order appointing the receiver gave the receiver much broader authority than
9 defendants/ cross-complainants Downtown Sunnyvale Residential, LLC (“DSR”); Downtown
10 Sunnyvale Mixed Use, LLC (“DSMU”); SHP San Jose, LLC (“SHP”); and Peter Pau dba San
11 Hill Property Company (“Pau”) (collectively, “Cross-Complainants”) contend. Cross-
12 complainants take the position that the receiver’s authority is merely as a “rents and profits”
13 receiver and the receiver’s role was limited to protection and preservation of the subject
14 property. “[T]he contractual agreements and the pleadings are factors to take into evidential
15 consideration in determining the purpose for which the receiver was appointed...” (*Turner v.*
16 *Superior Court* (1977) 72 Cal.App.3d 804, 812.) The complaint alleges that DSR/DSMU
17 consented to the appointment of a receiver and that Wachovia “shall have the right to ‘apply to
18 any court of competent jurisdiction for the appointment of a receiver *for all purposes...*’” (See
19 Exhibit A (¶26) to the Opposition RJN; emphasis added.) The allegation conforms to the terms
20 of the subject deed of trust. (See Exhibit C (p. 15 of Exhibit 3 to the Declaration of Karla
21 Brewer, etc.) to the Opposition RJN.) The prayer for relief in the complaint goes on to ask for
22 the appointment of a receiver to, in relevant part, “transact business or *take such other action of*
23 *any kind or type which would facilitate the development*, marketing, leasing or maintaining of
24 *the Sunnyvale Property or any portion thereof...*” (See Exhibit A (p. 13, lines 21 – 23) to the
25 Opposition RJN; emphasis added.)

26 While the October 5, 2009 order (Exhibit D to the Opposition RJN) issued by this court
27 (Hon. Elfving) appointing the receiver (“Appointment Order”) did include provisions regarding
28 the collection of rents/profits and the protection and preservation of the subject property, the

1 Appointment Order is much broader in granting power to the receiver to take other action(s),
2 including development of the subject property. For example, the Appointment Order granted the
3 receiver the following specific powers and duties:

4 5. *To in his discretion perform and complete contingent work under the*
5 *IIA to help ensure a successful opening of the Target development store;*

6

7 7. *To do any and all things necessary and appropriate to ensure timely*
8 *compliance with ownership and development obligations of the Project,*
9 including any easement, lease and entitlement obligations, and to ensure
10 that all taxes, assessments, utilities and insurance obligations are current,
11 all to avoid defaults or penalties and to generally protect the Project from
12 defaults or penalties;

13 ...

14 14. *To assume rights and responsibilities of the Borrowers under any*
15 *easement, development* (other than the Amended and Restated Disposition
16 and Development and Owner Participation Agreement, which shall require
17 the consent of the City of Sunnyvale), *construction*, lease or other
18 *agreements relating to the Project, to the extent that the Receiver deems*
19 *it to be in the best interests of the receivership estate to do so;*

20 15. *To negotiate all claims and resolve lawsuits against or relating to the*
21 *Collateral, including, but not limited to, construction contracts,*
22 *development agreements,* lease agreements, construction and other bonds,
23 *mechanic's liens,* insurance policies, and property tax assessments,
24 including appeals thereof;

25 16. *To negotiate with government agencies and adjoining land owners*
26 *regarding,* among other things, securing and protecting the Collateral, and
27 to the extent deemed necessary or advisable, *completing construction of*
28 *the improvements on the Project,* and the satisfaction of any and all

1 conditions and obligations related to the issuance of any conditions of
2 approval and/or certificates of occupancy for the Project;

3 32. Wachovia, in its capacity as administrative agent for itself and Bank of
4 America, N.A., as lenders, is authorized in its sole and absolute discretion,
5 to make advances ... to the Receiver for expenses incurred by the
6 Receiver in performing his duties hereunder. ...

7 33. The Receiver is authorized to issue and execute such documents as may be
8 necessary to evidence the obligation to repay such loan advances,
9 including but not limited to, the issuance of receivers' certificates ... in the
10 name of the receivership estate evidencing the obligation of the
11 receivership estate to repay such sums, all subject to the right of the
12 Receiver or Wachovia, in its capacity as agent and lender, in their
13 discretion, to seek further orders of this Court with respect thereto. ...

14 In spite of these provisions, Cross-Complainants further contend that an order issued on
15 November 3, 2009 (exhibit E to the Opposition RJN) by this court (Hon. Elfving) bolsters an
16 interpretation of the Appointment Order that the receiver's function was limited to protection and
17 preservation of the subject property rather than continued development. Respectfully, this court
18 does not find the November 3, 2009 order places any limitation on or conflicts with powers
19 previously granted to the receiver pursuant to the Appointment Order.

20 The receiver obtained further authority from this court (Hon. Murphy) on October 12,
21 2010 "to market and sell receivership property free and clear of liens and encumbrances and for
22 approval of expedited procedures and limited notice for court confirmation of any proposed
23 sale." (See Exhibit F to the Opposition RJN.) Although this court subsequently modified this
24 order (see Exhibit L to the Opposition RJN), the court considers the actions taken by the receiver
25 while the October 12, 2010 order was in effect.

26 Cross-Complainants question the propriety of the broad power given to the receiver
27 pursuant to the Appointment Order and subsequent orders, but the court's role in this instant
28 motion is not to question or reconsider the propriety of these prior orders. The court's function

1 now is limited to determining whether the receiver acted within the scope of the Appointment
2 Order and subsequent orders. In view of the express authority granted to the receiver by the
3 Appointment Order and subsequent orders, the court finds the receiver did not act outside the
4 scope of his given authority.

5 Not only do Cross-Complainants object on the ground that the receiver acted outside the
6 scope of his authority, but Cross-Complainants also object on the ground that the receiver failed
7 to properly carry out the duties imposed on him. (See *Shannon, supra*, 217 Cal.App.3d at p.
8 993.) Specifically, Cross-Complainants contend the receiver failed to comply with his obligation
9 to provide monthly reports. California Rules of Court, rule 3.1182 provides: “The receiver must
10 provide monthly reports to the parties and, if requested, to nonparty client lien holders. These
11 reports must include: (1) A narrative report of events; (2) A financial report; and (3) A statement
12 of all fees paid to the receiver, employees, and professionals showing: (A) Itemized services; (B)
13 A breakdown of the services by 1/10 hour increments; (C) If the fees are hourly, the hourly fees;
14 and (D) If the fees are on another basis, that basis.” Assuming all of the Cross-Complainants
15 were entitled to monthly reports¹, the Cross-Complainants contend that had they received the
16 monthly reports, they would have objected sooner to the receiver’s conduct and, particularly, the
17 receiver’s conduct in developing the subject property. However, as discussed above, this court
18 finds the receiver did not act outside the scope of the express authority granted to him.
19 Consequently, Cross-Complainants do not adequately demonstrate that they or the receivership
20 estate have suffered harm as a direct and proximate result of any failure by the receiver to issue
21 monthly reports.

22 Furthermore, Cross-Complainants contend the receiver violated his obligation to remain
23 neutral. The receiver is the agent of the court and not of any party and, as such, is neutral, acts
24 for the benefit of all who may have an interest in receivership property, and holds assets for the
25 court rather than the parties. (*O’Flaherty v. Belgium* (2004) 115 Cal.App.4th 1044, 1092; Cal.
26 Rules of Court, rule 3.1179, subd. (a).) On this issue, the court again finds that Cross-

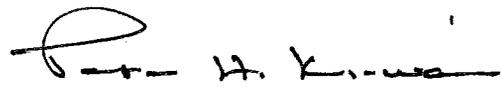
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¹ Pau and SHP were not parties to this litigation until the filing of their cross-complaint.

1 Complainants have not adequately demonstrated that any bias or lack of impartiality by the
2 receiver caused the Cross-Complainants or the receivership estate to suffer injury.

3 Cross-Complainants allude to Civil Code section 2924h, subdivision (g) which states, in
4 relevant part, "It shall be unlawful for any person, acting alone or in concert with others ... to fix
5 or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a
6 deed of trust or mortgage." The evidence proffered by Cross-Complainants does not substantiate
7 their claim that the receiver fixed or restrained bidding at the non-judicial foreclosure of the
8 subject property conducted on or about August 17, 2011.

9 In summary, Cross-Complainants' objections to receiver L. Gerald Hunt's final account
10 and report, request for approval of fees, exoneration of bonds, and discharge of all claims against
11 the receivership estate and receiver are hereby OVERRULED. Receiver L. Gerald Hunt's final
12 account and report are accepted and approved by this court. The court finds receiver L. Gerald
13 Hunt's fees and expenses of \$2,648,716.54 through October 4, 2011 to be reasonable. Plaintiff
14 Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A., shall pay all remaining
15 unpaid costs of the receivership estate through the date of entry of this order. The receiver shall
16 forward any cash remaining in the receivership bank account, after payment of the receiver's
17 fees, to plaintiff Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A. The
18 receiver L. Gerald Hunt and the receivership estate are hereby discharged of all claims. The
19 receiver's bond and the plaintiff's bond shall be exonerated. The receivership is terminated and
20 the receiver is discharged of all duties upon entry of this order.

21
22
23 Dated: 5/21/12



Hon. Peter H. Kirwan
Judge of the Superior Court