

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:23-CV-24903-CMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.

Defendants,

MARTIN I. HALPERN, AS TRUSTEE OF THE MARTIN I. HALPERN REVOCABLE TRUST AND TRUSTEE OF THE HALPERN FAMILY TRUST RESPONSE TO RECEIVER'S MOTION FOR EXPEDITED APPROVAL OF STEWART GROVE PROPERTY SALE [DE 128] AND OBJECTION TO THE SALE

Non-Party Movants, Martin I. Halpern, as Trustee of the Martin I. Halpern Revocable Trust and as Trustee of the Halpern Family Trust (“The Trusts” or “Non-Party Movants”) oppose the Receiver’s Motion for Expedited Approval of Stewart Grove Property Sale [DE 128], because amongst other things, (1) the granting of such motion would deprive the Trusts of their interest in real property without due process and (2) the Court lacks jurisdiction over the claims raised in the motion, and states:

MEMORANDUM OF LAW

I. INTRODUCTION

On May 2, 2024, the Receiver filed its Motion for Expedited Approval of Stewart Grove Property Sale (the “Motion” or “Receiver’s Motion”) [DE 128] requesting the Court to (a) approve a sale of the Stewart Property, as defined therein, for \$17.5 million to a buyer **free and clear of liens, claims and encumbrances through the closing date**, (b) approve the settlement agreement

with the first mortgage lender, and (c) approve the Receiver’s proposed process to resolve the lien claims against the Stewart Property (emphasis added). DE 128 at 2. Along with its motion, Receiver attached an “unopposed order”; to which the Trusts strongly object. DE 128-14.

As noted in the Motion, the Trusts hold a second mortgage on the Stewart Grove Property. DE 128 at 9. Thus, the expedited approval of the sale, if granted, would extinguish the Trusts’ mortgage lien rights in the Stewart Grove Property without it having proper notice or opportunity to be heard, and without them receiving any compensation¹, much less just compensation. Although the Receiver will argue that the Trusts “may” receive compensation in an unspecified future, should it, in its sole and absolute discretion, determine that the Trusts meet its arbitrary criteria of “equitable” distribution, such potential future discretionary compensation is not just compensation and the process outlined by the Receiver is not due process. Ultimately, the Receiver’s Motion must be denied because: (1) the Motion requests a grant of powers to the Receiver greater than it is entitled to under the law, (2) the Motion requires the Court ignore the mandatory requirements of 28 U.S.C. § 2001(b) that govern private judicial sales without a valid reason, (3) the relief requested, if granted, would deprive the Trusts of its property rights without due process, (4) if the relief sought is granted, the Court’s action would constitute a taking under the Takings Clause of the Fifth Amendment, and (5) the Court lacks subject matter jurisdiction to adjudicate the rights and interests of the various lienholders. Essentially, Receiver’s motion is

¹ It cannot be disputed that if the relief the Motion seeks is granted, the Trusts’ mortgage would be extinguished, the Trusts would no longer have property rights, and the Trusts would not have a legal right to compensation, but instead must rely on the Receiver’s sole discretion and goodwill.

inviting this Court to commit fundamental error ignoring both statutory and constitutional protections.

II. ARGUMENT

A. Receiver Stands in Shoes of Receivership Entity, and has no Greater Rights than Such Entity

It is an axiomatic principle “ ‘that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership’ .” *Perlman v. PNC Bank, N.A.*, 38 F.4th 899, 904 (11th Cir. 2022) (holding that the powers of a receiver cannot exceed those of the receiver entities and therefore, a receiver cannot bring claims or seek remedies that the receiver entities could not bring or recover) citing *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306 (11th Cir. 2020) (holding that receiver stands in the shoes of the receiver entities and does not have rights or remedies greater than those of the receivership entities).

On January 12, 2024, this Court entered the Stay Order to freeze all assets of the Receivership Defendants and granted the Receiver the following:

The Receiver shall have all powers, authorities, rights, and privileges heretofore possessed by the officers, directors, managers, and general and limited partners of the Receivership Defendants under applicable state and federal laws, and by any governing charters, by-laws, articles, and/or agreements...

[DE 28], p. 4 ¶ 4 (emphases added). As is typical, the Court here gave “the Receiver the same rights or powers to which the Receivership Entities would be entitled.” *Commodity Futures Trading Comm’n v. Oasis Int’l Group Ltd.*, 8:19-CV-886-T-33SPF, 2020 WL 8617558, at *4 (M.D. Fla. Sept. 14, 2020), report and recommendation adopted, 8:19-CV-886-T-33SPF, 2020 WL 8617559 (M.D. Fla. Oct. 19, 2020); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st

Cir. 1990) (holding that it is “well settled” that a receiver “ ‘has no greater rights or powers than the corporation itself would have.’ ”) (quoting *McCandless v. Furlaud*, 296 U.S. 140, 148 (1935)); *Phelan v. Middle States Oil Corp.*, 210 F.2d 360, 363 (2d Cir. 1954) (“In short, the [receiver's] ‘practice’ means the procedure by which he gets the power to do those things which an owner of the property would have without court authorization.”). Accordingly, as stated by the 11th Circuit in both *Isaiah* and *Perlman*, the Receiver stands in the shoes of the Receivership Entities and holds no greater power and is entitled to no greater remedies than those entities. Consequently, as a matter of law, the Receiver has no greater power to act upon the Stewart Grove Property than would its owner, Stewart Grove 1, LLC.

Despite this “axiomatic” restriction on its power, the Receiver through its Motion, seeks to extinguish the Trusts’ mortgage lien rights. However, Stewart Grove 1, LLC has no right to unilaterally extinguish the mortgage lien it gave the Trusts in exchange for a loan of \$4 million. Consequently, allowing the Receiver such a remedy in excess of what the Receivership Entity has, would exceed the authority granted by the Receivership Order and constitute an ultra vires act by the Receiver. *See Isaiah*, 960 F.3d at 1306 (holding that Receiver could not pursue remedies the receiver entities would be barred from pursuing). As such, this Court should deny the Motion.

The Receiver’s given reason for failing to acknowledge the Trusts’ second mortgage interest, while freely acknowledging the first mortgage position, is that it does not “understand the use of the loan proceeds”. DE 128 at ¶ 24. This reason has been given by the Receiver to the undersigned on multiple occasions. Specifically, the Receiver argues that because Stewart Grove 1, LLC and its affiliates may have used the loan proceeds received from the Trusts and secured by

its mortgage on other projects, it should be free to avoid the Trusts mortgage. Importantly, the Receiver does not dispute that the Trusts' loan was funded or that a mortgage was issued by an entity with the right to do so in consideration for the underlying loan. Instead, its position is that the borrower (Stewart Grove 1, LLC) of the Trusts' loan may have used the loaned funds for a different purpose, and that it will not acknowledge the Trusts' mortgage lien until the lender (the Trusts) provides satisfactory proof of how the borrower used those funds. This position is counter to the law and unsupportable because it implies that a borrower who uses loan proceeds for a different project can avoid its mortgage obligations. No such legal theory exists in the U.S.

As mentioned above, the Receiver stands in the shoes of Stewart Grove 1, LLC, the borrower of the Trusts' loan. There is no authority that exists, much less presented by the Receiver, that allows a borrower to refuse to honor a mortgage lien because it chose to use loan proceeds on something other than the mortgage property. Because the Receiver is limited to asserting the rights of the borrower, it cannot avoid the mortgage based on the conduct of the borrower. This is precisely the holding of *Perlman* in which the court barred a receiver from alleging fraud claims where the receiving entity would not have standing to assert such claims.

B. Procedural Requirements of Judicial Sales in 28 U.S.C. § 2001(b) are Mandatory upon Court

Although the Receiver acknowledges that 28 U.S.C. § 2001(b) governs the very sale it proposes be approved and acknowledges the process in § 2001(b) is mandatory, it claims that this Court has discretion to avoid this statute because it, the SEC and Mr. Kapoor unilaterally decided to waive it. DE 128 at 22. In other words, the Receiver argues the procedural protections of §2001(b) that were put in place to protect all interested parties from fraud should be ignored to the

detriment of interested parties who cannot object, because it is inconvenient for the Receiver to have those protections. § 2001(b) directs that the Court can only order a private sale if:

(b) After a hearing, of which **notice to all interested parties shall be given** by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the **court shall appoint three disinterested persons to appraise such property** or different groups of three appraisers each to appraise properties of different classes or situated in different localities. **No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation.** The **private sale shall not be confirmed if a bona fide offer is made**, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(emphasis added); *see S.E.C. v. Wilson*, No. 12–cv15062, at *2 (E.D. Mich. Mar. 28, 2013) (“The word shall in § 2001(b) unambiguously means must.”). Here, Receiver is asking this Court to ignore the mandatory requirements of (1) a hearing for interested parties to participate, (2) notice to all interested parties, (3) appointment of three disinterested persons to appraise the property, (4) sale can only occur if price is more than 2/3 of appraised value and (5) the right of interested parties to make bona fide offers that exceed private sale amount by 10%.

“These standards cannot be waived by this Court.” *Sec. & Exch. Comm'n v. EB5 Asset Manager, LLC*, 15-62323-CIV, 2016 WL 7508252, at *1 (S.D. Fla. Mar. 25, 2016). “Congress enacted the foregoing safeguards to protect against the high opportunity for fraud inherent in private sales of realty.” *S.E.C. v. T-Bar Res., LLC*, No. CIV.A.3:07CV1994-B, 2008 WL 4790987, at *4 (N.D. Tex. Oct. 28, 2008). “This purpose could not be effected if non-compliance with any

material requirement were permitted, and, for that reason, all of the requirements are, by the express terms of the statute, made conditions precedent to a valid sale.” *Id.* (quoting *Acadia Land Co. v. Horuff*, 110 F.2d 354, 354–55 (5th Cir. 1940)); *Sec. & Exch. Comm'n v. Fujinaga*, No. 213CV1658JCMCWH, 2017 WL 4369467, at *2 (D. Nev. Oct. 2, 2017) (finding “no exception” to the requirement of three disinterested persons to appraise the property before approving the private sale).

Because these requirements are mandatory, “in private judicial sales, the court must ‘appoint three disinterested persons to appraise’ the property to be sold,” and reiterated that “[c]ourts have no power to confirm a private sale at a price ‘less than two-thirds of the appraised value.’ ” *Redus Fla. Com., LLC v. Coll. Station Retail Ctr., LLC*, 777 F.3d 1187, 1196 n.16 (11th Cir. 2014) (citing 28 U.S.C. § 2001(b)). Here, the Receiver’s Motion to Sell does not comply with the mandatory terms of the statute, which impose an independent, mandatory obligation on the Court to ensure objective fairness in the sale and public notice. Thus, the Court lacks the power to approve the sale.

Although it is true that a couple of courts have suggested that parties may have a right to waive these procedures as to each other, there is no court opinion that allowed named “parties” to collude to waive these protections on behalf of “interested parties” non-parties whose property rights would be eliminated through a collusive sale. In fact, there is no indication in the cases cited by the Receiver in its Motion that parties can waive the statutory and lien rights of non-parties and conduct a private sale that extinguishes those non-parties’ lien rights while at the same time objecting to the non-parties intervening to assert the very rights the Receiver seeks to extinguish.

For example, *Sec. & Exch. Comm'n v. EB5 Asset Manager, LLC*, 15-62323-CIV, 2016 WL 7508252, at *2 (S.D. Fla. Mar. 25, 2016) held that it is possible for waiver of § 2001(b) to be made; however, the court explicitly rejected the waiver proposed and found no waiver, and further did not address the question of whether the rights of non-party lienholders' can be waived by stipulation of the parties as the Receiver argues should happen. *See also Huntington Nat'l Bank v. Big Sky Dev. Flint*, No. 10-10346, 2010 WL 3702361, at *2 (E.D. Mich. Sept. 16, 2010) (only addressing the issue of waiver of §2001(b) in dicta and not addressing non-parties rights). Similarly, in *Big Sky Dev.*, the court did not at all address waiver of rights of non-parties, instead, it held that a party who voluntarily waived the process of §2001(b) via a stipulation filed with the court, could not argue that the procedures needed to be followed. Thus, neither of the two opinions addressed the merits of the waiver and in neither case was the waiver applied to non-parties.

In other words, although parties may waive rights they have as to each other, they may not waive the rights of non-parties. § 2001(b) requires "all interested parties" be given notice and an opportunity to participate. Consequently, § 2001(b) is designed to protect "all interested parties", not just parties, who are allowed to know in advance of the sale its appraised value by non-interested appraisers and have an opportunity to participate in the sale and make offers. Nevertheless, these statutory protections, which were designed to protect against the very type of ex parte collusion the Receiver is asking the Court to sanction, have not been waived by the Trusts or any other subordinate lien holder. Accordingly, the waiver argument is frivolous as the non-parties, whose property rights are sought to be exterminated, have not knowingly or voluntarily agreed to waive §2001(b).

Moreover, nothing in §2001(b) allows a receiver or a court in a private sale to extinguish the property rights of non-parties without due process. Nothing in the statute even addresses lien rights of non-parties. In fact, although the Receiver may have the power to sell the property, it lacks the power to extrajudicially adjudicate the interests of other lien holders, because as discussed above, it stands in the shoes of the owner of the Stewart Grove Property and has no greater rights or remedies. Stewart Grove 1, LLC has no right to conduct a sale that would extinguish the statutory lien rights on non-parties. In fact, any sale effectuated by Stewart Grove 1, LLC would be subject to the recorded encumbrances on the property unless those are resolved at closing. If Stewart Grove were to sell the Stewart Grove Property, the purchaser would either purchase with the encumbrances or resolve them before closing. Thus, even if the “parties” could waive the requirements of § 2001(b) to the detriment of non-parties, there is absolutely no precedent that allows the parties to collude to extinguish the property rights of non-parties by stipulation as the Receiver argues to this Court. Such a precedent would completely undermine the statutory intent of § 2001(b) and invite the very collusive fraud § 2001(b) was designed to prevent.²

C. Approval of Sale would Deprive Trusts of Property without Due Process

“The Due Process Clause of the Fifth Amendment guarantees that ‘[n]o person shall ... be deprived of life, liberty, or property, without due process of law.’” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). This protection provides that “individuals must receive

² In fact, the one case the Receiver cites for the proposition that this Court can extinguish mortgage lien rights, *United States v. Brewer*, 2009 WL 1748504, at *5 (M.D. Fla. June 19, 2009), involved a judicial sale under § 2001(b) in which all the procedural protections were followed and in which the lien holders were given a security interest based on their priority on the proceeds of the sale. Thus, there is nothing that indicates that a receiver can avoid the procedural protections of § 2001(b) while at the same as extinguishing the rights of lienholders without compensation or due process.

notice and an opportunity to be heard before the Government deprives them of property.” *Id.* There is no pleading in this case that seeks to invalidate, rescind or avoid the Trusts’ mortgage. Nevertheless, the Receiver’s Motion and proposed order, if granted on an expedited basis, would eliminate the Trusts’ mortgage without adjudication of its priority lien rights, without legal basis, without hearing and without due process as would occur in a standard mortgage foreclosure action³. Moreover, the required hearing under § 2001(b) would be avoided as would the remaining statutory protections afforded to interested parties under § 2001(b). In sum, lienholders would lose their property rights without participation. Notably, the Receiver has put forth no argument, much less evidence, why the Trusts’ mortgages should be voided as it requests to do other than generally saying it is equitable. Nevertheless, the Receiver requests this Court to invalidate the Trusts’ mortgage, and all other liens on the Stewart Grove Property, without a legal basis, much less a hearing to determine a legal basis to void the mortgages. If the Receiver’s Motion were granted without the participation of the interested parties who hold an interest in the Stewart Grove Property, it would violate the due process clause. *See Melikhov v. Drab*, 219CV248FTM66MRM, 2020 WL 7419528, at *2 (M.D. Fla. Oct. 19, 2020) (in proceedings supplementary to enforcing a judgment, holding that due process requires non-parties with interest in property subject to execution to be implead so that the Court may fashion full and appropriate relief while observing due process). Accordingly, it must be denied.

³ In addition to losing its rights as mortgagee, the Trusts would lose another important right; the ability to credit bid at a foreclosure sale and participate in the sale; a right they have under state law, which governs foreclosures.

D. Approval of Sale would Constitute a Taking without Just Compensation

In addition to violating all lienholders' due process rights and avoiding the statutory protections afforded to all interested parties without basis, the Receiver is inviting this Court to violate the Takings Clause by extinguishing non-parties lien rights without just compensation. *See Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) (holding that taking under the fifth amendment occurred where government's actions resulted in the extinguishment of valid materialmen liens under Maine law because lienholders had compensable property, and after governmental intrusion lost such property). The Supreme Court explained that by taking title without encumbrance it resulted in the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." *Id.* As such, the lienholders were entitled to just compensation. *See also Sheldon v. United States*, 7 F.3d 1022, 1026 (Fed.Cir.1993) ("There is no difference, for Fifth Amendment purposes, between a mortgage lien and the materialmen's liens at issue in *Armstrong*."), overruled on other grounds, *Kam–Almaz v. United States*, 682 F.3d 1364, 1372 n. 1 (Fed.Cir.2012); *Hogan v. Bleeker*, 193 N.E.2d 844, 849 (Ill. 1963) ("it is clear from the decisions of this court and of the Supreme Court of the United States that liens, including those authorized solely by statute, ... have been considered to be sufficiently substantial so as to fall within the concept of 'property' that is protected by the provisions of both the Federal and State constitutions prohibiting ... the taking of property without due process").

Unironically, in communications with undersigned, the Receiver repeatedly (and inaccurately) argues that it should be permitted to request a total extinguish the lien rights of non-parties without due process or just compensation and that this Court may grant the same, because a trustee in bankruptcy is afforded the same powers. Putting aside that the Receiver's powers and rights are limited to those of the Receiver Entities and that the Receiver role is distinct from that of bankruptcy trustee, the Supreme Court has explicitly rejected that a court can take such action against a mortgagee under the Bankruptcy Act. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935) (in declaring certain provisions of the Bankruptcy Act that effectively diminish mortgagee's rights unconstitutional under the Fifth Amendment, the Supreme Court held that even if "the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.") compare *Sol-G Const. Corp. v. United States*, 231 Ct. Cl. 846, 850 (Ct. Cl. 1982) (where U.S. government is acting in its proprietary capacity as superior lienholder and plaintiff's liens were lost by operation of law through a foreclosure proceeding such extinguishment does not constitute a taking). Consequently, the categorical extinguishment of the Trusts and other lienholders' rights that the Receiver is proposing would result in a takings and entitle the Trusts to just compensation.

E. The Court Lacks Subject Matter Jurisdiction to Adjudicate Rights of Non-Party Lienholders

Federal courts are courts of limited subject matter jurisdiction that possess only the power authorized by statute or the Constitution. *Kokkoken v. Guardian Life Ins. Co. of America*, 511 U.S.

375, 377 (1994). Absent a grant of such jurisdiction, a federal court is “powerless” to consider the merits of a case. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). A district court must have jurisdiction under at least one of the three types of subject-matter jurisdiction: (1) jurisdiction pursuant to a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 (11th Cir.1997). “It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkoken*, 511 U.S. at 377.

In its Motion, the Receiver acknowledges that there is a pending foreclosure complaint under which the lien rights to the Stewart Grove Property are currently being adjudicated, which is stayed as a result of the Freeze Order [DE 28]. DE 128 at 24. Notably, the foreclosure of state law liens does not pose a federal question. Additionally, as apparent by the foreclosure complaint [DE 128-2], there is no diversity as both the plaintiff, whom the Receiver stands in the shoes of, and all interested parties/lienholders/defendants are citizens of Florida. DE 128-2 at pp. 1-2. Accordingly, the Receiver is asking this Court to functionally adjudicate the rights of lienholders, extinguish those rights and order a judicial sale as would be requested in a foreclosure.

However, this Court would lack subject matter jurisdiction to preside over such an action if independently brought by the Receiver, because there is no federal question nor diversity. In addition, even if all interest lienholders were properly implied as third-parties in this case, the Court would still lack supplemental jurisdiction under 28 U.S.C. § 1367(a) because such an action would not arise out of the same case or controversy as the SEC’s complaint. *Exxon Mobil Corp. v.*

Allapattah Servs., Inc., 545 U.S. 546, 558 (2005) (“Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction.”). In essence, through a motion, the Receiver is asking this Court to adjudicate rights and claims that it would lack subject matter jurisdiction to adjudicate if properly raised in a pleading. Consequently, the Receiver’s Motion must be denied as a blatant attempt to circumvent subject matter jurisdiction.

III. CONCLUSION

For the reasons stated herein, the Court should deny the Motion. It is clear that the Motion is an attempt to subvert the Trusts and other interested parties’ constitutional right to due process and the statutory protections created by congress under § 2001(b) design to prevent fraud in private sales so the Receiver can at its own discretion, and without regard to the law, decide which liens to enforce and which not to without allowing lienholders any semblance of due process. In sum, the Receiver’s proposal invites this Court to commit error on several fronts and adjudicate issues over which it lacks jurisdiction. Thus, Receiver’s motion must be denied.

WHEREFORE, Martin I. Halpern, as Trustee of the Martin I. Halpern Revocable Trust and as Trustee of the Halpern Family Trust (“The Trusts” or “Non-Party Movants”) respectfully requests this Court deny the Receiver’s Motion for Expedited Approval of Stewart Grove Property Sale and grant such other relief as is necessary and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing document was served via CM/ECF on May 17, 2024 on the parties listed within CM/ECF.

/s/ Mark F. Raymond
Mark F. Raymond, Esq.