

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

INDEPENDENT BANK,

Plaintiff,

vs.

Case No. 2014-1908-CK

DEVILLE PLAZA, LLC, BENEDETTO
SORRENTINO REVOCABLE LIVING
TRUST DATED JULY 8, 2005, and
BENEDETTO SORRENTINO,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion to appoint a receiver. Defendants have filed a response and request that the Court deny Plaintiff's motion.

Factual and Procedural History

On December 27, 2010, Defendant Deville Plaza, LLC ("Defendant Deville") executed a mortgage ("Mortgage") granting Plaintiff a mortgage interest in real property commonly known as 19100 Telegraph Road, Brownstown, Michigan ("Subject Property"). On the same date, Defendant Deville executed a promissory note in favor of Plaintiff for \$1,266,412.91 ("Note"). In addition, Defendants Benedetto Sorrentino Revocable Living Trust Dated July 8, 2005 ("Defendant Trust") and Benedetto Sorrentino ("Defendant Sorrentino") each executed a commercial guaranty ensuring Defendant Deville's obligations under the Note.

Defendant Deville has since defaulted on its obligations under the Note. After unsuccessfully demanding payment, Plaintiff foreclosed on the Subject Property; however, the

statutory redemption period has not expired. On May 12, 2014, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff states claims for: Breach of Note/Deficiency Balance against Defendant Deville (Count I); Open Account against all Defendants (Count II); Breach of Commercial Guaranty against Defendant Trust and Defendant Sorrentino (Count III); and Appointment of Receiver (Count IV).

Plaintiff now seeks to have a receiver appointed to prevent waste to the Subject Property. Defendants oppose the motion and request that it be denied.

Applicable Law

MCL 600.2926 grants the circuit court the power to appoint receivers, and states:

Circuit court judges in the exercise of their equitable powers, *may appoint receivers in all cases pending* where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. In all cases in which a receiver is appointed *the court shall provide for bond and shall define the receiver's power and duties* where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.

The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

This statute does not independently grant the court the authority to appoint receivers but rather confirms that appointment of a receiver is a remedy available to the court in situations where “allowed by law.” *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 649-650; 444 NW2d 549 (1989). Although there are several statutes which specifically allow appointment of a receiver, the phrase “allowed by law” is not limited to these statutes, since the Supreme Court has recognized that there are cases where the trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority. *Id*; see *Michigan Minerals, Inc v Williams*, 306 Mich 515, 525-527; 11 NW2d 224 (1943); *Grand*

Rapids Trust Co. v Carpenter, 229 Mich 491; 201 NW 448 (1924). It thus becomes apparent that, as used in the statute, the phrase “allowed by law” refers to (1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction. *Id.*

The power to appoint receivers is inherent in courts of equity. *Michigan Minerals, Inc. v Williams*, 306 Mich 515, 11 NW2d 224 (1943). A receiver may be appointed where necessary to prevent fraud or to protect property against imminent danger of loss. *Weathervane Window, Inc v White Lake Const Co* 192 Mich App 316, 322; 480 NW2d 337 (1991); 65 Am.Jur.2d, Receivers, § 27, p. 879. The primary purpose of a receiver is to preserve property and to dispose of it under order of the court. *Id.*; *Band v Livonia Associates*, 176 Mich App 95, 439 NW2d 285 (1989).

Receivership is a harsh remedy to be granted only in cases of extreme necessity. *Hofmeister v Randall*, 124 Mich App 443; 335 NW2d 65 (1983). A bond is required in every case of receivership. MCL 600.2926. The Court must provide for a bond, and spell out the powers and duties of the receiver if law does not otherwise set them. MCR 2.622(A)(7). A receiver is the trustee of all the assets of the debtor, holding for the benefit of the debtor, creditor, and other interested persons. MCL 600.2926 and MCR 2.622(A)(7).

Arguments and Analysis

In its motion, Plaintiff contends that a receiver should be appointed because such an appointment is provided for in the Mortgage. The applicable portion of the Mortgage provides:

Appoint Receiver. Any failure of [Defendant Deville] to pay any taxes assessed the [Subject Property] or to pay installment of those taxes or to pay any insurance premium upon any policy covering any property located upon the [Subject Property] shall constitute waste and shall entitle [Plaintiff] to appointment by a

court of competent jurisdiction of a receiver of the [Subject Property] for the purpose of preventing the waste.....[Plaintiff] shall have the right to have a receiver appointed to take possession of all or any part of the [Subject Property], with the power to protect and preserve the [Subject Property], to operate the [Subject Property] preceding foreclosure or sale, and to collect the Rents from the [Subject Property] and apply the proceeds, over and above the cost of the receivership, against the Indebtedness.

Further, the above-referenced provision is authorized by MCL 600.2927, which provides,

in pertinent part:

Sec. 2927. (1) Nonpayment of taxes or insurance as waste. The parties to any mortgage, trust mortgage, or deed of trust of real property, or any extension thereof, may, by agreement therein contained to that effect, provide that the failure of the mortgagor or grantor, as the case may be, to pay any taxes assessed against such property or installments thereof, in the event said taxes are being paid under the provisions of Act No. 126 of the Public Acts of 1933, as amended, or any insurance premium upon policies covering any property located upon such premises constitutes waste.

(2) Receiver to prevent waste; collection of rents and income. If such mortgagor or grantor in such instrument fails to pay such taxes or insurance premiums upon property subject to the terms of a mortgage, trust mortgage, or deed of trust containing such agreement the circuit court having jurisdiction of such property may, in its discretion upon complaint or motion filed by such mortgagee, grantee, assignee thereof or trustee under such instrument and upon such notice as the court may require, appoint a receiver of the property for the purpose of preventing such waste. Subject to the order of the court, the receiver may collect the rents and income from such property and shall exercise such control over such property as to such court may seem proper.

In this case, it appears undisputed that Defendants have failed to pay the property taxes due and owing on the Subject Property. Further, Defendants appear to concede that they have failed to maintain the Subject Property as required by Defendant Deville's leases with the tenants of the Subject Property. Rather, Defendants contend that they are unable to satisfy these obligations because Plaintiff is collecting all of the rent being paid in connection with the Subject Property and assert that Plaintiff should be required to pay the taxes and fund the maintenance since they are collecting all of the rent. However, the mortgagor retains legal title until the

expiration of the redemption period. *Ruby & Assoc, PC v Shore Financial Services*, 276 Mich.App 110, 118; 741 NW2d 72 (2007), vacated not in relevant part 480 Mich 1107 (2008). In this case, Defendant Deville retains legal title to the Subject Property until the redemption period expires, which prevents Plaintiff from unilaterally curing/preventing the waste at issue. Further, Defendants have represented to the Court that they are unable to maintain the property and pay the outstanding taxes due to their lack of income. Consequently, the Court is convinced that a receiver is the only means available to prevent further waste. As a result, Plaintiff's motion must be granted.

Conclusion

Based upon the reasons set forth above, Plaintiff's motion to appoint a receiver is GRANTED. Plaintiff shall submit an order appointing a receiver over the Subject Property under the seven day rule, MCR 2.602(B). In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: May 21, 2014

JCF/sr

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