

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

EPC COMMERCIAL II LLC,

Plaintiff,

Case No. 2015-273-CB

vs.

TOWN CENTER FLATS, LLC,
VICENT DILORENZO and
ANGELA TINERVIA,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for contempt against Defendants Town Center Flats, LLC ("TCF") and Defendant Vincent DiLorenzo ("Defendant DiLorenzo")(TCF and Defendant DiLorenzo collectively, "Defendants"). Defendants have filed a response and request that the motion be denied.

I. Factual and Procedural History

On January 23, 2015, Plaintiff filed its complaint in this matter ("Complaint"). On July 5, 2017, this Court entered an Order appointing James Evans as the receiver over, *inter alia*, all of TCF's accounts receivables and TCF's other rights to payment ("Receivership Order"). (See Plaintiff's Exhibit 1.)

On July 6, 2017, the Receiver held a meeting with TCF's principals. At that meeting, Defendant DiLorenzo, one of TCF's principals, turned TCF's July 2017 rents over to the Receiver. The Receiver then inquired as to why TCF's May and June 2017 rents had not been tendered to him. After failing to give the May and June 2017 rents to

the Receiver, Plaintiff filed a motion for order to show cause for contempt against Defendants.

On July 12, 2017, the Court issued an Order to Show Cause in connection with Plaintiff's motion. Over the course of July 20, 2017 and August 2, 2017, hearings were held in connection with the motion. At the hearing, the argument focused on whether a retainer TCF paid to its counsel prior to entry of the Receivership Order in the amount of \$7,500.00 must be transferred from counsel to the Receiver to the extent that it had not been earned as of the date the Receivership Order was entered. At the conclusion of the hearing, the Court took the matter under advisement.

II. Arguments

Plaintiff avers that the \$7,500.00 retainer must be transferred to the Receiver as part of the receivership estate to that extent that it was not earned as of the date the Receivership Order was entered.

Defendants maintain that the funds in question do not fall within the receivership estate, that the funds should not be turned over because it would deprive TCF of legal representation, that counsel would not have agreed to be retained to represent TCF without the retainer, and that the funds have been earned by TCF's counsel.

III. Law and Analysis

As a preliminary matter, while Plaintiff's motion is entitled as a motion to hold Defendants in contempt, Plaintiff's counsel represented at the August 3, 2017 that the remaining portion of the motion is more appropriately categorized as a motion to enforce the Receivership Order. Accordingly, the Court will address the pending motion as a motion to enforce rather than a motion for contempt.

In this case, it is undisputed that the check for the retainer in question was written on July 2, 2017, three days before the Receivership Order was entered. Further, the check was deposited on July 11, 2017. Additionally, it appears uncontested that the funds have since been held by Defendants' counsel in escrow as a retainer.

Defendants' first argument is that the Receivership Order does not require them to attempt to have third parties' turn over funds to the Receiver. However, the "third party" in question is Defendants' counsel, who is specifically referenced in the Receivership Order. In particular, the Receivership Order provides:

11. TCF and each of its officers, directors, agents, attorneys and employees.....are hereby ordered immediately to (i) turn over to the Receiver the Records; (ii) pay over to the Receiver all cash and all funds and deposits in any Deposit Accounts or investments of TCF, except for funds required to pay checks for expenses of TCF that have been issued on or before the date of entry of this Order but have not yet been presented for payment; and (iii) cooperate with the Receiver in identifying and locating Receivership Assets, transitioning the operations of any Receivership Assets to the Receiver, and identifying and investigating any causes of action of TCF. Notwithstanding the foregoing, all proceeds of the Mortgaged Property shall be remitted by the Receiver (or any other person or entity in possession thereof) to ECP for application first to Professional Fees and then to the Obligations.

(See Plaintiff's Exhibit 1.)

In their response, Defendants argue that subsection (ii) removes the funds in question from the Receivership Estate. However, even if the Court were to assume that the check in question were to fall within subsection (ii), the last sentence of paragraph 11 provides that all proceeds from the Mortgaged Property, which clearly includes rent, shall be remitted to the Receiver notwithstanding the other parts of paragraph 11. Accordingly, whether the funds and/or check fall within subsection (ii) is immaterial. Further, based on the last sentence of

paragraph 11, Defendants and their counsel are were required to transmit all proceeds of the Mortgaged Property to the Receiver. Rent is clearly a form of proceeds from the Mortgaged Property. Moreover, any portion of those funds that had not been earned by Defendants' counsel remained Receivership Assets. Consequently, Defendants and their counsel were required to transfer those funds to the Receiver. For these reasons, the Court is convinced Defendants and/or their counsel must transfer any portion of the funds in question that had not been earned as of July 5, 2017 to the Receiver.

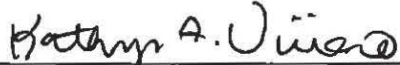
Finally, with respect to Defendants' argument that they would not have been able to retain counsel without the funds in question, that fact is irrelevant. TCF's ability to use the funds in question ended, at the latest, on the date the Receivership Order was entered. Indeed, the parties have recognized that the Sixth Circuit has previously found that the rental payments are Plaintiff's property. Accordingly, the funds in question were not Defendants' property. Therefore, Defendants' inability to utilize the funds in question is appropriate and not unjust.

IV. Conclusion

Based on the foregoing, Defendants and their counsel are hereby ordered to transfer any portion of the \$7,500.00 retainer paid to Defendants' counsel not earned as of July 5, 2017 to the Receiver within two days of the date of this Opinion and Order. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Date: AUG 22 2017



Hon. Kathryn A. Viviano, Circuit Court Judge