IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DAVIS-GIOVINAZZO CONSTRUCTION COMPANY, INC,	: NOVEMBER TERM, 2002
	: No. 1247
Plaintiff,	: (Commerce Program)
v.	:
HERITAGE VILLAGE VENTURES, II, INC., DG RENAISSANCE, J.V., RENAISSANCE COMMUNITY DEVELOPMENT CORPORATION and PAULA S. PEEBLES,	:
Defendants.	:
SAVERIO AGRESTA, FRANCIS GIOVINAZZO, and GENERAL MASONRY, INC.	: Superior Court Docket No. 2334 EDA 2005
Intervenors.	:

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O P I N I O N

Albert W. Sheppard, Jr., J. ……..…… October 11, 2005

This Opinion is filed relative to the defendants' appeal of this court's Order of June 27, 2005, which Order authorized, but did not require, the Receiver to file a Bankruptcy petition and to take any necessary action to act as a debtor-in-possession.

For the reasons discussed, this court's Order should be affirmed.

INTRODUCTION

This has been a very difficult matter for this court; primarily, because these defendants (in the almost three years we have been involved) have never cooperated with this court's efforts to effect a resolution favorable for everyone involved. Indeed, these defendants have been rude obstructionists.

To present a background, this court will rely and respectfully resubmit its Opinion of July 20, 2005. That Opinion responded to the defendants' appeal of this court's Order appointing the temporary receiver. The prior Opinion is attached to this Opinion as Appendix "A".

In the interim since that Opinion, this dispute has been removed to the United States Bankruptcy Court. As a consequence, it is believed that this appeal is moot as to all defendants, except Paula S. Peebles. Ms Peebles, as far as this court knows, is not before the Bankruptcy Court.

DISCUSSION

This court submits that it was appropriate to authorize the Receiver to file for bankruptcy protection. After this court appointed the Receiver, these defendants filed a third mortgage on the property - - an act which they were legally **not** permitted to do. The effect of this improper mortgage filing was set forth in the appealed from Order and constituted the basis upon which this court believed it was necessary to authorize the Receiver to file the bankruptcy. In essence, this disingenuous ploy by defendants impaired the Receiver's ability to sell the property to pay off the three and one-half million dollar debt. In fact, a potential buyer had been found, but the sale was obviated by the filing of the mortgage.

In sum, then, confronted with this situation, this court concluded that the fairest thing to do was to give the Receiver the authority requested. It is submitted that this decision was a proper one. *See*, e.g., Veiner v. Jacobs, 834 A.2d 546, 552 (Pa. Super. 2003) (appellate court noted that trial court appointed a liquidating receiver for the corporate defendants and subsequently approved the receiver's request to file for protection pursuant to the United States Bankruptcy Code).

CONCLUSION

For the reasons discussed,[1] this court respectfully submits that its Order of June 27, 2005 should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[1] On July 26, 2005, this court directed defendants to file a concise statement of matters complained of in this appeal. *See* Pa. R. App. P. 1925(b). Defendants failed to comply with this directive. Thus, it is not clear precisely what in the June 27th Order the defendants find objectionable. Further, this court respectfully suggests that Superior Court can consider defendants' failure to file a 1925(b) Statement to be a waiver of all objections to the June 27th Order. *See id*.

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	: No. 01247
Plaintiff,	: (Commerce Program)
v.	:
HERITAGE VILLAGE VENTURES, II, INC., DG RENAISSANCE, J.V., RENAISSANCE COMMUNITY DEVELOPMENT CORPORATION and PAULA S. PEEBLES,	:
Defendants.	:
SAVERIO AGRESTA, FRANCIS GIOVINAZZO, And GENERAL MASONRY, INC.	: Superior Court Docket No. 3212 EDA 2004
Intervenors.	:

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O P I N I O N

Albert W. Sheppard, Jr., J. …… July 20, 2005

This Opinion is filed relative to the defendants' appeal of this court's Order of October 21, 2004 which appointed a temporary Receiver for the Heritage Village Shopping Plaza Construction project.[2]

For the reasons discussed this court's Order should be affirmed.

APPENDIX "A"

[2] In the interim and during the preparation of this Opinion, the temporary Receiver filed a suggestion of bankruptcy involving all defendants, except Paula S. Peebles. It appears, then, that the Bankruptcy Stay section would not apply to Ms. Peebles. Thus, this Opinion is necessary.

BACKGROUND

This case involves a shopping mall construction project (the "Project") located at 11th Street and Girard Avenue in Philadelphia, and is one of a number of lawsuits involving the Project, which has experienced severe financial woes. The accumulated debt of the Project amounts to about 3.4 Million dollars.

One related action was brought by Wachovia Bank, N.A. ("Wachovia") - - the bank that issued the construction loan for the Project - - against Heritage Village Ventures II, Inc. ("Heritage"), the owner of the property on which the Project is being built. Wachovia seeks to foreclose on the property due to Heritage's default on the loan.[3] In a second action, Wachovia claims that the developer of the Project, Renaissance Community Development Corp. ("Renaissance"), is liable to Wachovia as a guarantor of the loan to Heritage.[4] A number of other actions have been brought by subcontractors who worked on the Project against the general contractor and/or its bonding company, Great American Insurance Company ("GAIC"). These subcontractors allege that they have not been paid for work they performed on the Project.[5]

This action was instituted by Davis Giovinazzo Construction Company ("Plaintiff"), who together with Renaissance formed a joint venture to act as the general contractor for the Project, DG Renaissance, J.V. (the "Joint Venture").[6] Plaintiff contends that, due to Heritage's and

[3] Wachovia Bank, N.A. v. Heritage Village II, Inc., January Term, 2004, No. 00388. Heritage counterclaimed against Wachovia for breach of the loan contract, tortious interference, and defamation.

[4] Wachovia Bank N.A. v. Renaissance Community Development, January Term, 2004, No. 00395.

[5] International Partners, Inc. v. DG Renaissance J.V., June Term, 2002, No. 02036; Aversa General Contractors v. DG Renaissance J.V., March Term, 2003, No. 05177; Hamada, Inc. v. Great American Ins. Co., December Term, 2003, No. 00682. In addition to the claims of the subcontractors that are reflected in these suits, there are numerous other subcontractors who have contacted GAIC regarding their claims, but who have forborne from filing suit while GAIC was working with Heritage, Renaissance, and this court to try to get the Project up and running again. *See* 7/27/04 Order, Schedule A; 10/15/04 Transcript, p. 20.

[6] Under the terms of the Joint Venture Agreement, Renaissance was "to oversee and manage the construction of the Project" and Plaintiff was to "negotiate all subcontracts" and "provide and maintain a payment and performance bond for the Project." Complaint, Ex. B, pp. 3-4. In addition, Plaintiff was to be paid

Renaissance's mismanagement of the Project, numerous subcontractors have not been paid, resulting in claims amounting to approximately $1.2 million against GAIC under the bond.[7] Plaintiff further alleges that, as an indemnitor under the bond agreement with GAIC, it will ultimately be liable for the amounts GAIC pays to the subcontractors. The intervenors, Saverio Agresta, Francis Giovinazzo, and General Masonry, Inc. (the "Intervenors") are also indemnitors.[8] Plaintiff, itself, has a judgment in the amount of $435,917.00 for work done on the Project as a result of a partial summary judgment Order entered by this court.[9]

Because Wachovia called a default of the construction loan and refused to advance any additional proceeds to fund the Project, Heritage and Renaissance have no money with which to pay the outstanding claims of the subcontractors. Because the subcontractors have not been paid for the work they have completed, they refuse to do additional work. There are no funds to hire other contractors to finish the Project. The Project is about 85 percent (85%) completed. Due to the three years that the Project has remained in this vulnerable condition, exposed to the elements, much of the work may have to be redone. *See* 10/7/03 Transcript, pp. 17-18; 10/15/04 Transcript, pp. 61-63.

In order to get the Project moving again, Heritage would have to obtain alternative financing with which to pay Wachovia, the subcontractors, and the Project's other creditors. For almost three years, this court, the creditors, and other interested parties have sedulously worked

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$200,000.00, and Renaissance was to indemnify Plaintiff for claims arising out of the performance of the Joint Venture Agreement. *Id.*, Ex. B, Addendum.

[7] Plaintiff also asserted such claims against Paula Peebles, who is the president of the Board of Heritage and president and CEO of Renaissance. *See* 5/5/04 Transcript, p. 57.

[8] The court granted the Intervenors' unopposed Petition to Intervene. *See* 6/1/04 Order.

[9] At one of the hearings in this matter, Heritage and Renaissance agreed that they owed $316,000.00 to Plaintiff, and had a duty to indemnify Plaintiff for other amounts. *See* 10/7/03, pp. 11-15. Subsequently, the court granted Plaintiff's unopposed Motion for Summary Judgment and awarded Plaintiff judgment in the amount of $435,917.00, which included the $316,000.00 for work Plaintiff performed on the Project and $119,917.00 for payments that Plaintiff made to three of the unpaid subcontractors. *See* 8/31/04 Order.

with Heritage to find additional financing. For example, in one instance, plaintiff fronted $31,500.00 to Heritage, so that Heritage could apply for a loan from Equity Financial Services. *See* 5/5/04 Transcript, p. 25-6; 6/7/04 Transcript, p. 20, Ex. P-1. However, that loan never closed.

Because Heritage has repeatedly made promises that it was on the verge of obtaining a loan,[10] the court and the creditors agreed to extensions of time for the trial of this matter, and ultimately for payment of the amounts due. *See* 10/7/03 Transcript, pp.3-8, 17. Unfortunately, no loan was ever obtained and no additional funds ever became available.

As a result of Heritage's complete and ultimate failure to obtain additional funding, plaintiff and the Intervenors moved to have the court appoint a Receiver for the Project. After a hearing, at which Ms. Peebles testified on behalf of Heritage and Renaissance in opposition to the Motion, the court appointed William E. Howe & Co, a well respected, local CPA firm as temporary Receiver (the "Receiver"), for Heritage, Renaissance, and the Joint Venture. The Receiver was required to take possession of their assets, to determine their liabilities, and to make recommendations and report to the court on the possible sale of the Project property. *See* 10/21/04 Order. The court further ordered that the plaintiff and the Intervenors post a bond of $10,000.00 and that the Receiver post a bond of $2,500.00. *See id*. Heritage, Renaissance, and Ms. Peebles have appealed from this Order appointing the Receiver.

DISCUSSION

I. The Determination of Insolvency Was Correct.

Defendants object to this court's declaration in the October 21, 2004 Order that Heritage and Renaissance are insolvent. "Insolvency" is defined as:

[10] The defendants, through Ms. Paula Peebles, promised that additional funds were forthcoming at hearings on: 11/14/02, 2/12/03, 10/7/03, 2/19/04, 6/2/04, 7/23/04, 7/27/04 and 8/31/04 - - on at least eight occasions.

> an inability to pay one's debts; lack of means to pay one's debts. Such a relative condition of a man's assets and liabilities that the former, if all made immediately available, would not be sufficient to discharge the latter. Or the condition of a person who is unable to pay his debts as they fall due, or in the usual course of trade or business.

Black's Law Dictionary (5th Ed. 1979). *See also* 12 Pa.C.S. § 5102 (under the Fraudulent Transfers Act, "a debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all the debtor's assets. . . . A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent."); 13 Pa.C.S. § 1201 (under the U.C.C., "a person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the Federal bankruptcy law."); 11 U.S.C. § 101 (under Federal bankruptcy law, insolvent means "a financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation . . ."). It, therefore, appears that there are two types of insolvency. The first, the failure to pay debts as they become due, is apparent insolvency. The second, having liabilities that outweigh assets, is actual insolvency.

Given the nature of the claims raised in this and the related actions, Heritage and Renaissance have clearly ceased to pay their debts as they became due. Instead and during the course of this litigation, defendants have delayed paying the Project's many subcontractors and other creditors for almost three years. Therefore, they satisfy the requirements for a finding of apparent insolvency, and the court properly labeled them "insolvent." As to whether they fit the definition of actual insolvency, the court cannot determine whether their debts to the various subcontractors and other creditors are greater than their assets, i.e. the property where the Project is located, until the Receiver has performed the function for which he was appointed, which is to determine the value of Heritage's, Renaissance's, and the Joint Venture's assets and liabilities.

II. The Appointment of the Receiver Was Proper.

Appellants object to this court's appointment of the Receiver for the Project on several grounds. First, they claim that plaintiff and the Intervenors have no interest in the Project property, so they do not have standing to request a Receiver for such real property. However, plaintiff is a judgment creditor of the Project, and plaintiff and the Intervenors are, in effect, guarantors of the Project at least with respect to the subcontractors and the bond. Thus, they both have standing to request that a Receiver be appointed to ascertain how the Project's debts can be best discharged.

Secondly, Appellants object to the necessity, propriety, and exigency of appointing a Receiver under the facts of this case.

> "Although appointment of a receiver is not to be undertaken lightly, the decision to appoint is within the sound discretion of the trial court . . . [R]eceivers can be appointed to assure that assets will not be dissipated. However, where the appointment will cause more damage than it prevents, it should obviously, not be made."

Abrams v. Uchitel, 806 A.2d 1, 8 (Pa. Super. 2002). A receiver will not "be appointed where there is another safe, expedient, adequate and less drastic remedy at law." Credit Alliance Corp. v. Phila. Minit-Man Car Wash Corp., 450 Pa. 367, 372, 301 A.2d 816, 819 (1973).

Here, the record demonstrates that the Project's assets continue to deteriorate while its creditors clamor, to no avail, to get paid. Further, notwithstanding at least ten promises on the record over a two and on-half year period that additional funds were being obtained, the defendants have been unable to come up with necessary funds. In addition, the defendants continue to dispute the amounts due to those creditors, although it is not clear to the court that the Project documents which justify these contentions have ever been produced. The court has given Heritage and Renaissance several years to obtain alternative financing to solve their

financial problems, but they have not succeeded in doing so. Nor have they pointed the court to any other remedy for this deplorable situation that will accomplish the goal of determining what is owed and paying the Project's creditors. The appointment of a Receiver is wholly justified under such circumstances. *See* Abrams v. Uchitel, 806 A.2d 1, 8 (Pa. Super. 2002) (where Appellants "allow[ed] the physical plants of the development projects, mostly shopping centers, to deteriorate, and refus[ed] to supply financial records where necessary, no other remedy . . . would prevent further damage to the partnership's assets.")

Further, the sub-contractors have not been paid for two and one-half years. They have families with the concomitant living expenses, tuitions, etc. The court intends that they be paid. The Project itself lies dormant, exposed to the weather and may soon be a complete loss. The community where the Project is located is in real need for its completion. In sum, this court could not wait any longer. It simply had to act.

III. The Bond Amounts Were Proper.

Defendants object that the amounts of the bonds ordered by the court are too low. However, since the court held a hearing on the Motion for Receiver, no bond was required from plaintiff. *See* Pa. R. Civ. P. 1533(a) (plaintiff must file a bond only if the receiver is appointed without notice to defendants); Levin v. Barish, 505 Pa. 514, 524, 481 A.2d 1183, 1188 (1984) ("the rule does not require security from a plaintiff when the appointment [of a receiver] is made with notice to all parties.") Given that the court previously found that plaintiff has at least $435,917.00 tied up in the Project, the court's requirement that it put up another $10,000.00 was more than fair to protect defendants' interests.

The amount of the Receiver's bond is left to the court's sound discretion. *See* Pa R. Civ. P. 1533(d). In this case, the sole asset under the Receiver's control is a piece of unoccupied and unfinished real estate, over which the Receiver does not have power of sale without court approval. The court is hard pressed to envision how the Receiver could cause significant damage to such an asset in the short time in which the Receiver exercises control over it, and so, a bond of $2,500.00 is more than reasonable to protect against any such illusory harm.

IV. No Restriction on the Sale of the Property was Required.

Defendants further object that the Project property can be sold only to a non-profit entity, since it is currently held by a non-profit entity, Heritage. The court is not aware of any law that imposes such a restriction on the sale, for fair market value, of property owned by a non-profit, although the law applicable to the dissolution of non-profits requires that any assets remaining after payment of all just debts should be transferred to a similar non-profit. *See* 26 CFR 1.501(c)(3)-1. However, Heritage and Renaissance are not (yet) being dissolved. Instead, the court was hoping to avoid such a drastic solution to the Project's problems when it appointed the Receiver.

V. The Summary Judgment Order Is Not Appealable.

Appellants also object to this court's award of partial summary judgment to plaintiff in the amount of $435,917.00, which Order was entered on August 31, 2004, a month and a half prior to the Order appointing the Receiver from which this appeal was taken. However, the partial summary judgment Order is not presently appealable because it adjudicates fewer than all the claims and parties and is, therefore, not a final order from which appeal may be taken.[11] *See* Pa. R. App. P. 341(c).

[11] If it had been a final order, then Appellants attempt to appeal it now would be untimely as the appeal was filed more than 30 days after entry of the Order. *See* Pa. R. App. P. 903.

CONCLUSION

For the reasons discussed, this court respectfully requests that the Superior Court affirm the court's Order, dated October 21, 2004, appointing a receiver for the Project.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.