

NO. A09-962

State of Minnesota
In Court of Appeals

STATE BANK OF DELANO,

Plaintiff—Respondent,

v.

CENTERPOINT ENERGY,

Defendant—Appellant,

And

SWARTZ BROTHERS ASSOCIATES, INC.
AND KENSINGTON EQUITY PARTNERS, INC.,

Defendants—Respondents,

And

GLACIAL HILLS ELEMENTARY SCHOOL,

Intervenor—Respondent.

APPELLANT'S REPLY BRIEF AND
SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION

Relying exclusively on foreign authority, the Bank argues that the Receiver has no duty to pay obligations of the property owner incurred prior to the appointment of the Receiver. This claim is belied by the order appointing Receiver itself (drafted by the Bank), which authorizes the Receiver to:

[P]ay prior obligations incurred by the Borrower or others responsible for the Property only if deemed necessary for the continued operation of the Property and its improvements.

Order Appointing Receiver (AA 074) at part 4(v).

The question thus is not *whether* the Receiver should pay past due obligations of the property owner, the question is whether such payment is *necessary for the continued operation of the Property*. Paying past due utility bills was clearly necessary for the continued operation of this rental property -- failure to pay would lead to disconnection of service, and no tenant would lease the property without heat and hot water.

The remaining question then, is, how could the lower court determine that paying the delinquent bills was not necessary for the continued operation of the property? The court in granting the injunction stated only the conclusion that “[a] past due utility bill incurred by Defendant Kensington is unlikely to be a necessary expense of the Receiver, whose role is to preserve the asset during the redemption period.” AA 029. In its summary judgment decision, the district court essentially negated its prior order appointing the Receiver, in which it ordered (as quoted above) that the Receiver *should* pay past obligations necessary for the continued operation of the property. The court

inexplicably accepted the Bank's blanket argument that a "rent receiver" never has to pay any such past due obligations of any nature. AA 012.

The district court then compounded its conflicting orders by ruling that a utility bill "does not impinge on the property itself," which makes no sense. AA013. If a utility bill for providing necessary heat and hot water to a premises does not impinge on the property -- what does? Finally, the district court further compounded its error by calling the Receiver a "new customer" of the utility. AA 016. The district court cited no authority for this conclusion, which again contradicts its prior order authorizing the Receiver to pay past due obligations of the property owner as necessary for the continued operation of the property. If the Receiver were in fact a distinct and separate entity from the property owner, the court would have had no reason to authorize the Receiver to pay the property owner's past due obligations, as by definition the Receiver would have no obligation to pay them.

In sum, the district court's decision in this case contradicts its prior order appointing the Receiver. In the prior order, the court clearly contemplated the Receiver "stepping into the shoes" of the property owner, in numerous ways. In the district court's order in this case, it inexplicably and without authority contradicted its prior order. The court's prior order appointing the Receiver clearly established a Receiver who "stepped into the shoes" of the property owner, and in light of this order the court had no basis to rule to the contrary with respect to the unpaid gas bill.

I. THE COURT SHOULD RECOGNIZE THE DIFFERENCE BETWEEN A RECEIVERSHIP AND A BANKRUPTCY.

The Bank in this case wants to “cherry pick” the receivership entirely for its own benefit. Although it rejects the notion that the Receiver “stands in the shoes” of the property owner, the Bank does want the Receiver to take over the property owner’s right to collect rents that are owed to the property owner (not the Bank or the Receiver) under lease contracts that pre-existed the appointment of the Receiver. So from the Bank’s point of view, the Receiver does “stand in the shoes” of the property owner, when the Bank wants it to, which appears to be limited to enforcing leases and collecting revenues.

There is no way to harmonize that position with the Bank’s argument that the Receiver is some type of “new customer” or separate entity from the property owner, that has no obligation for the debts of the property owner, including debts for utility service that were in fact essential in generating the very rents the Bank wants the Receiver to collect.¹ What the Bank argues for, in essence, is that the appointment of the Receiver is a bankruptcy -- discharging the obligations of the property owner prior to the date of the appointment of the Receiver, while still collecting revenues owed to the property owner. For the Bank, however, this is even better than a bankruptcy, because the revenues collected, and assets of the property owner, are not made part of a bankruptcy estate for the benefit of all creditors. Instead, in the Bank’s view of this receivership/bankruptcy,

¹ The Bank contends there were no delinquent rent payments due at the time the Receiver was appointed, but in fact the record does not indicate that tenant Ag Code was current in rent at that time. The Bank’s reference only addresses the school tenant’s status. See Respondent’s Brief at 19. Further, the Bank certainly will take the position that the Receiver is entitled to collect past due rent, and as such is authorized to collect rents earned by virtue of the delinquent gas bills.

all the revenues go only to the Bank, except for “current” obligations incurred after the Receiver was appointed.

In that regard it is revealing that the Bank likes to refer to the Receiver as “Rent Receiver.” The statute under which the Receiver is appointed does not use that term, nor does the court order appointing the Receiver. The duties and obligations of the Receiver in this case go far beyond collecting rents. For the Bank, however, this is how it treats the Receiver -- one who receives rents for the Bank, but has no obligations to other creditors. This nomenclature and practice has no basis in statute or the court order appointing Receiver in this case.

The fact remains that the appointment of a Receiver is not a bankruptcy. The day before the Receiver was appointed, the property owner owed CenterPoint Energy a delinquent balance due, and the property was subject to disconnection of service. The Bank has to establish that the appointment of a Receiver extinguished that obligation and immunized the property from the utility’s remedy of disconnection of service. The Bank has failed to meet that burden. The district court simply ruled, by *ipse dixit*, that the Receiver was a “new customer.” That ruling is unsupported and unprecedented, and should be reversed.

Determination of the relative rights of banks and other creditors in a property receivership such as this is an important issue that deserves more than a conclusory analysis. There are scores of these receiverships underway right now, and a dearth of authority in Minnesota construing the legal parameters of the action. Because banks originate these actions and like to control the Receiver (note the joint brief of Bank and

Receiver in this case), the banks to date have dictated the process and have overreached in effectively treating the process like a bankruptcy. The Court of Appeals should correct this and recognize the limited effect of the receivership. The Court of Appeals should limit the effect of the receivership to expressly what is contained in the authorizing statute. Nowhere in that statute is there a discharge of delinquent utility charges or an intent to immunize the property from a utility's right of disconnection of service.

A. Whether a “Property Receiver” Or A “Business Receiver,” The Obligation To Pay Delinquent Utility Bills Is Not Discharged.

The Bank makes too much of the difference between a Receiver who has been appointed by the court over a particular property and a Receiver who has been appointed by the court over an entire business. There is no question that the scope of a Receiver's role differs as the assets under the Receiver's care changes – but the *character* of the Receiver's role does not. In both, the Receiver “inherits” all of the rights and obligations associated with those assets.

The character of the Receiver's *control* is the same – it is exhaustive. Just look to the “court's order appointing Receiver,” which takes two full pages to list the explicit powers of the Receiver, which went far beyond the power to collect rent. The court gave the Receiver plenary power with respect to the property. The court's charge to the Receiver was to “care for the property during foreclosure.” AA 067. The Receiver is not the agent of the Bank, but must be “indifferent as to the litigants and should be impartial and disinterested.” AA 070.

In particular, the Receiver was empowered to do the following with respect to the property under Minn. Stat. § 559.17 and the courts order appointing Receiver. Note that all of these things involve legal obligations of the property owner incurred prior to the appointment of a Receiver:

- * “payment of all tenant security deposits then owing to tenants under any of the Leases.” AA 071.
- * “payment of all prior or current real estate taxes and special assessments with respect to the Property.” AA 071.
- * “payment of all premiums then due for the insurance required by [the Mortgage].” AA 071.
- * “payment of all expenses for the normal maintenance of the property.” AA 071.
- * “complete any construction or repair of the Improvement” AA 073.
- * “commence, continue, settle or otherwise terminate legal proceedings relating to the Property” AA 073.
- * “negotiate, extend, terminate, modify, renegotiate, ratify or enter into leases.” AA 074.
- * “negotiate, extend, terminate, modify, renegotiate, ratify or enter into contracts, including, without limitation, contracts to provide . . . utility and other services to the Property and to pay for those services as an expense of the Property.” AA 074.
- * “pay prior obligations incurred by the Borrower or others responsible for the Property only if deemed necessary for the continued operation of the Property.” AA 074.

Furthermore, the character of the Receiver’s *duty* is the same. Even when a receivership is limited to particular property, the Receiver has fiduciary obligations to all parties in interest – not just the foreclosing bank. *Equity Trust Co. v. Cole*, 766 N.W.2d 334, 341 (Minn. Ct. App. 2009) (citing *Shadewald v. White*, 77 N.W. 42 (Minn. 1898));

Ballard v. Park Place Land Co., 12 A.2d 247 (N.J. Ch. 1940), *modified* by 129 N.J. Eq. 597 (1941). A “limited” Receiver does not have limited duties; the duties are the same, regardless of whether the Receiver operates an entire entity or just a single property. The fiduciary duty derives from the Receiver’s appointment as an officer of the court. The Receiver controls the property not for its own interests or purposes, but in trust for the property owner, who will get the property back if the mortgage default is cured or the owner redeems the property. During the course of the receivership, there is no assurance that the property necessarily will be owned by the Bank.

The key point, however, is that in neither case does a receivership change other parties’ pre-existing relationships to the property held in receivership. In the case of a property receivership, the Receiver holds the *status quo* while the court determines how the proceed – here, while the foreclosure action was pending. That *status quo* with respect to the parties’ legal rights is precisely what CenterPoint seeks, and what the law requires. CenterPoint had the right to shut off gas service the day before the receivership order was put in place, and it continued to have that right after the Receiver was appointed. Regardless of whether this receivership was limited to the Starbuck property, the order appointing the Receiver did not abolish or modify CenterPoint’s rights under the tariff to disconnect gas service to the property.

B. Priority Is Not An Issue.

The Bank’s argument about priority is misplaced. The Bank as secured party would have priority as to enforcement of any judgment for damages. That is undisputed. By tariff, however, CenterPoint is entitled to disconnect service for non-payment. Minn.

Rule pt. 7820.1000. This is not an issue of priority because it does not involve collection of a judgment or receipt of payment by CenterPoint. It is the operation of a regulatory tariff and a condition of service. The Receiver does not have to pay the past due bill. The Receiver may choose to switch the property to fuel oil or propane, or may choose to go without service. Thus the disconnection of service remedy does not necessarily involve a payment that is subject to issues of a priority. The Receiver may determine whether service is “necessary for the continued operation of the property” and if so may or may not pay the bill. CenterPoint, however, has the right to disconnect service if payment is not made, and nothing in the receivership order changed that.²

This is an important distinction because it negates the Bank’s contention that, if the Court accepted CenterPoint’s position, the Receiver would be obligated “to pay all the debts of the debtor.” Respondents’ Brief at 29-30. That is not true. The order makes clear that Receiver should pay past due bills as necessary to ensure the continued operation of the property. If the Receiver chooses not to pay a vendor of the property, e.g., landscaper, janitor, security firm, etc., that vendor may stop work, just as

² The Bank decries the right of disconnection of service as “extortion tactics,” although one might conclude that foreclosure and sale of a borrower’s property is a pretty strong remedy as well. The case does not call for such pejorative labeling. The Bank and CenterPoint each are creditors enforcing their rights. CenterPoint’s rights are based in law -- Minn. Rules pt. 7820.1000 -- that is just as valid and enforceable as the receivership statute. The issue for determination is not whether either remedy is bad or good -- the issue is to determine whether appointing a Receiver extinguishes the disconnection remedy. The Receivership order itself makes clear it does not, when it authorizes the Receiver to pay past due obligations of the property owner when necessary for the continued operation of the property.

CenterPoint will stop work.³ If that Receiver determines the property can operate without the services of that vendor, nothing in the order requires the Receiver to pay the vendor. Any resulting judgment will be subject to the Bank's priority position.

C. The Receivership Order Does Contemplate The Receiver Paying Past Due Obligations Of The Property Owner.

The Bank devotes three pages of its brief to the argument that "Nothing in the Order or in the Receivership Statute Requires the Receiver to Back Pay Invoices for Months Prior to the Appointment of the Receiver." See Respondents' Brief at 27-30. Nowhere in that discussion, however, does the Bank address section 4(v) of the Receivership Order, which authorizes the Receiver to:

[P]ay prior obligations incurred by the Borrower or others responsible for the Property only if deemed necessary for the continued operation of the Property and its improvements.

Order Appointing Receiver (AA 074) at Section 4(v).

Perhaps the Bank is literally correct in stating that the Order does not require the payment of past due invoices. If the Receiver determined that payment of the past due invoices was not necessary for the continued operation of the property, then perhaps the Receiver is not required to pay them.

What section 4(v) makes clear, however, is that the Receiver cannot simply disregard the past due invoices. The Order does not discharge any obligation for past due invoices. The Order contemplates that payment of some past due invoices may be necessary for the continued operation of the Property. And in that one sentence, the

³ CenterPoint did argue in the court below that the right of disconnection operates as an equitable lien. See Appellant's Supplemental Appendix at ASA 009.

Order completely undercuts the Bank's position, and the district court's decision, that Receiver was entirely and absolutely immunized from any obligation to pay past due obligations of the property owner.

D. The Receiver Assumes The Property Owner's Contracts.

The Bank's argument that the Receiver had no contract with CenterPoint again demonstrates its "cherry picking" approach to the receivership. The Receiver literally is not a party to any of the leases between the property owner, yet the Bank wants the Receiver to collect rents pursuant to those contracts. The Bank cannot justify its position that the Receiver essentially is party only to those contracts that the Bank likes.

Further, the Receivership Order, drafted by the Bank, authorizes the Receiver to "negotiate, extend, terminate, modify, renegotiate, ratify or enter into contracts, including, without limitation, contracts to provide . . . utility and other services to the Property and to pay for those services as an expense of the Property." AA 074. The Receiver, being authorized to extend or renegotiate contracts, necessarily must be a party to those contracts, as it "steps into the shoes" of the property owner during the receivership.

E. The Receiver Is Not A New Customer Of The Utility.

As discussed above, the Receivership Order expressly contemplates that the Receiver will pay past due obligations of the property owner when necessary for the continued operation of the property. Additionally, the Receiver is authorized to extend, modify or renegotiate existing contracts of the property owner, making clear the Receiver assumes the property owner's position in those contracts. This is entirely consistent with

the fact that the Receiver holds the property to maintain the status quo. The property may well revert back to the property owner if the Bank fails to prove its foreclosure case or if any default is cured or the property is redeemed.

This reality is reflected by the Receiver's action to establish service in the name of "Kensington Receiver" and not in the name of Swartz Brothers Associates, Inc., the actual name of the Receiver. See RA 141, ¶ 7 (as to name of the account); RA 140, ¶ 2 (as to name of the Receiver). Clearly, Swartz Brothers had no intention of being a new customer of CenterPoint. It did not take service in its own name. When the receivership is over, Swartz Brothers has no intention of paying any unpaid bills, or of being responsible for them. If the rents are insufficient to pay even the current gas bills, Swartz Brothers will not dip into its own pocket to cover a deficiency. This all is true because Swartz Brothers is not a new customer of CenterPoint. It took over the property owner's contracts, by court order, as an officer of the court, on a temporary basis until the mortgage foreclosure action is resolved.

The Bank's reliance entirely on foreign authority that does not construe the Receivership Order at issue in this case simply is irrelevant.

II. CENTERPOINT IS ENTITLED TO PURSUE ITS UNJUST ENRICHMENT CLAIMS AGAINST THE BANK AND THE RECEIVER.

But for the district court's erroneous ruling, CenterPoint would have been able to pursue unjust enrichment claims against the Receiver and the Bank. Had the Court not entered its rulings precluding CenterPoint from pursuing these claims, CenterPoint may have recovered payment for the delinquent bills. As a result of the erroneous rulings, the

Receiver may have obtained excess cash that it was allowed to keep under the Receivership Order. See AA 072 (Order section 2(f)(iv)). Additionally, the Bank may have advanced funds to pay the bills but for the erroneous ruling. See AA 072 (Order Section 3). As a result, either the Receiver or the Bank, or both, may have more funds than they are entitled to under proper operation of the Receivership Order, and thus have been unjustly enriched. CenterPoint is entitled to discover the true facts regarding these claims and pursue such funds as may be available to satisfy a resulting judgment.

The case cannot be moot given that the Receiver still exists as an entity, and has retained counsel to appear in this action. The Receiver has submitted a Statement of the Case, has co-signed the Respondent's Brief, and presumably will appear and argue at oral argument in this case.

CenterPoint pled an unjust enrichment action, which was dismissed solely on the basis of the district court's erroneous decision that CenterPoint could not state a claim against the Receiver. Because that decision should be reversed, CenterPoint should be allowed to pursue the claim further in the district court.⁴

CONCLUSION

For all the foregoing reasons CenterPoint Energy respectfully requests that the Court of Appeals reverse the district court's order that the Receiver was immunized from any obligation to pay utility bills incurred prior to the appointment of the Receiver.

⁴ Also, as argued in the Appellant's Brief and not rebutted at all by the Bank/Receiver, if the court found the case to be moot as between the parties, this is still an action "capable of repetition yet evading review" that should be addressed on appeal. See Appellant's Brief at 27.

Dated: August 10, 2009



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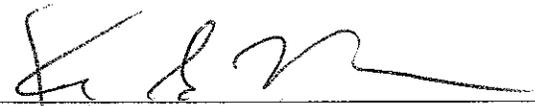
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional Times New Roman 13-

point font. The length of this brief is 3,501 words. This brief was prepared using Microsoft Word 2003.

Dated: August 10, 2009 
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