UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. CASE NO: 8:09-cv-87-T-26TBM

ARTHUR NADEL; SCOOP CAPITAL, LLC; and SCOOP MANAGEMENT, INC.,

Defendants,

SCOOP REAL ESTATE, L.P.; VALHALLA INVESTMENT PARTNERS, L.P.; VALHALLA MANAGEMENT, INC.; VICTORY IRA FUND, LTD.; VICTORY FUND, LTD.; VIKING IRA FUND, LLC; VIKING FUND, LLC; and VIKING MANAGEMENT, LLC,

Relief Defendants.
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O R D E R

Before the Court is BB&T's Motion for Turnover of Sale Proceeds of Fairview Property Subject to Mortgage Interest (Dkt. 1159), the Receiver's Opposition (Dkt. 1163), BB&T's Reply (Dkt. 1168), and the Receiver's Sur-reply in Opposition (Dkt. 1169). Afer careful consideration of the argument of counsel, the applicable law, and the entire file, the Court concludes that the motion should be denied.

BACKGROUND

In this equitable receivership proceeding, this Court entered two key orders pertaining to claims. On April 21, 2010, in granting the Receiver's "Motion to (1) Approve Procedure to Administer Claims and Proof of Claim Form, (2) Establish Deadline for Filing Proofs of Claim, and (3) Permit Notice by Mail and Publication,"[1] this Court established the procedure for filing proofs of claim. The order reads in pertinent part:

> 2. Each person or entity that asserts a claim against the Receivership arising out of or related in any way to the acts, conduct, or activities of the Receivership Entities must submit an original, written Proof of Claim, in the form attached to the motion as Exhibit A, to the Receiver [c/o Maya M. Lockwood, Esq.], to be received on or before the later of 120 days from the entry of this Order or 90 days from the mailing of the Proof of Claim Form to known possible Claimants (the "Claim Bar Date"). Any person or entity that fails to submit a Proof of Claim to the Receiver on or before the Claim Bar Date (i.e., fails to take the necessary steps to ensure that the Proof of Claim is received by the Receiver on or before the Claim Bar Date), shall be forever barred and precluded from asserting any claim against the Receivership or Receivership Entities (as that term is defined in the Motion).[2]

On March 2, 2012, in granting the Receiver's "Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan of Distribution, and (4) Establish Objection Procedure,"[3] this Court ordered in pertinent part:

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[1] See docket 390 (motion).

[2] See docket 391 (order).

[3] See docket 675 (motion).

> 7) The Proposed Objection Procedure . . . for objections to the plan of distribution and the Receiver's claim determinations and claim priorities is . . . approved, and any and all objections to claim determinations, claim priorities, or the plan of distribution shall be presented to the Receiver in accordance with the Proposed Objection Procedure . . . ; and
> 8) To bring finality to these matters and to allow the Receiver to proceed with distributions of Receivership assets, any and all further claims against Receivership Entities, Receivership Property, the Receivership estate, or the Receiver by any Claimant taxing authority, or any other public or private person or entity and any and all proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership Property, or the Receivership estate are barred and enjoined absent further order from this Court.[4]

The claims determination motion did not specifically mention or separate from all claims the loan on the Fairview Property.[5] BB&T did not file an objection to the claim determination after entry of the March 2012 order.

BB&T contends that it did not realize it had not submitted the proof of claim until April 26, 2012, when the Receiver, in a letter, informed it that its claim for the Fairview loan had been forfeited based on the non-receipt of the proof of claim. The letter informed BB&T that the April 2010 order established the specific process for "*all* creditors to submit claims to assets of this Receivership."[6] The letter stated that the

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[4] See docket 776 (order).

[5] See docket 675.

[6] See docket 1164-4.

claims bar date expired on September 2, 2010, and that BB&T had not timely submitted a claim related to the Fairview Property, despite its filing a claim for the Laurel Preserve property.[7] The Receiver recited the relevant part of the March 2012 order barring and forever enjoining any further claims against the receivership, and specified that "BB&T is currently precluded from asserting its claim with respect to the [Fairview Property] and the mortgage loan relating to that property." Upon receipt of this letter, BB&T emailed the proof of claim for the Fairview Property.[8]

ARGUMENT

BB&T argues it believed in good faith that it had submitted its secured claim by the September 2, 2010, claims deadline. The employee who allegedly electronically submitted the proof of claim to the Receiver has not been found, and there is no ability to confirm that the proof of claim was sent.[9] BB&T contends that as a secured creditor it was not required to submit a proof of claim to protect its lien. Furthermore, the Receiver knew of the lien since 2009 and, therefore argues BB&T, there was no need to file a proof of claim, the purpose of which was to impart knowledge of the lien on the Receiver. Finally, BB&T submits that excusable neglect justifies relief for the untimely filing of the proof of claim, and the receivership estate suffered no prejudice because the Receiver has

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[7] The Receiver had received a timely proof of claim from BB&T on another North Carolina property, Laurel Preserve.

[8] See docket 1164-5.

[9] See docket 1160, Exh. 1, para. 14 & Exh. 3, paras. 3-7.

set aside funds from the sale of the Fairview Property with which to satisfy the lien. Addressing each argument, the Receiver primarily contends that the relief sought is time-barred under Federal Rule of Civil Procedure 60(c)(1).

ANALYSIS

The issue before the Court is whether a secured creditor's mortgage lien passes through this equitable receivership unaffected, despite the Receiver's failure to receive a proof of claim before the claims deadline of September 2, 2010. The Receiver knew of the mortgage lien from 2009 to date, as was evidenced by the interim reports noting the the BB&T loan "of approximately $248,560.62" secured by a mortgage lien. On April 26, 2012, the Receiver informed BB&T that he had not received a proof of claim on the mortgage encumbering the Fairview Property. While BB&T emailed a copy of the proof of claim to the Receiver on that date, the issue of the validity of the proof of claim was not brought before this Court until this motion, which was filed almost three years later.

Rule 60(c)(1) allows one year after the entry of an order for a party to seek to reopen the order to obtain relief on the basis of mistake, inadvertence, surprise, or excusable neglect articulated in Rule 60(b)(1). Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship, 507 U.S. 380, 393, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993). The order of March 2, 2012, grants the Receiver's claims determination motion, which did not reference the loan on the Fairview Property. The March 2012 order approves the determination of claims, claim priorities, and the plan of distribution as set forth in the

claims determination motion. It further sets forth a claims objection procedure. To insure finality to the plan, the order declares "all further claims . . . and all proceedings or other effects to . . . otherwise collect on any lien . . . are hereby barred and enjoined. . ." BB&T did not seek to set aside the March 2012 order within one year, and the Receiver in a letter disclosed its position one month after the order was entered to the effect that BB&T was then precluded from asserting its claim with respect to the Fairview Property. Submissions of excusable neglect may not be considered here because one year elapsed from the entry of the March 2012 order,[10] long before this Court was requested to set aside the order as to the Fairview Property.

BB&T argues vehemently that this equitable receivership is akin to a bankruptcy proceeding, which excuses secured creditors from filing a proof of claim in the context of

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[10] Rule 60 "permits courts to reopen judgment for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motion made within one year of the judgment." Pioneer, 507 U.S. at 393. If this Court were to reach the issue of excusable neglect, however, BB&T's burden of proof has not been met. Although there is no indication that BB&T did not act in good faith, it is evident that prejudice exists to both the victims of the fraud and the judicial administration of this receivership. See In re Intelligent Med. Imaging, Inc., 262 B.R. 142, 146 (Bankr. S.D.Fla. 2001). Unlike the order in Pioneer, the Court's order is clear and unambiguous in the instant case. See In re Bautista, 235 B.R. 678, 683 (Bankr. M.D.Fla. 1999) (distinguishing Pioneer and finding no excusable neglect based on the unambiguous court orders); In re Norris, 228 B.R. 27, 32 (Bankr. M.D. Fla. 1998) (same). This Court's citation to bankruptcy cases does not express an adoption of bankruptcy law to this equitable receivership, but merely points out that even under bankruptcy principles, there is no excusable neglect. See this Court's prior order entered April 25, 2012, at docket 822 at pp. 12-13 and cases cited therein ("[A]lthough federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law, [footnote omitted] they are not restricted by the dictates of bankruptcy law."); and this Court's order entered on August 29, 2013, at docket 1061 at pp. 7-8, reiterating its ruling at docket 822 ("Any attempted analogy between the significance of a proof of claim under bankruptcy law with respect to any presumption of its validity and one submitted in the course of this equity receivership is unavailing.").

the Bankruptcy Code and rules promulgated thereunder. See, e.g., In re Bateman, 331 F.3d 821, 827 (11th Cir. 2003); In re Thomas, 883 F.2d 991 (11th Cir. 1989), cert. denied, 497 U.S. 1007, 110 S.Ct. 3245, 111 L.Ed.2d 756 (1990). This Court cannot begin to list, or even fathom, the intricacies, nuances and differences under the many specific provisions of the Bankruptcy Code and its rules, in trying to analogize any lack of requirement that a secured creditor file a proof of claim in any particular bankruptcy case to the unambiguous order in the present federal equity receivership requiring that claimants follow a particular procedure or suffer their claims forever barred. The burden rested on BB&T as a secured creditor to protect its rights pursuant to the framework clearly set forth in the conduct of this receivership. The claims process procedure did not contain any language exempting secured creditors from filing a proof of claim. Consequently, the failure to file a timely proof of claim, or timely submit evidence of excusable neglect, barred BB&T from enforcing the lien against the sale proceeds by asserting a claim against the receivership estate.

Finally, BB&T relies on Bankers Trust Co. v. Florida East Coast Ry. Co., 31 F.Supp. 961, 963 (S.D. Fla. 1940), as dispositive of this motion. Because the Bankers Trust court reasoned that the object of filing a proof of claim was to give a receiver notice of the existence of a claim, and because the Receiver in this case had notice that the claim existed since its initial interim reports, BB&T contends that it was exempt from filing a proof of claim. Bankers Trust is distinguishable on the law and its facts. This Court did

not act to alter the terms of a statute, as the court did in Bankers Trust. The orders in this equitable receivership are clear that the claim bar date and subsequent bar and injunction serve to impose finality, regardless of whether the Receiver had notice that a lien existed.

It is therefore **ORDERED AND ADJUDGED** that BB&T's Motion for Turnover of Sale Proceeds of Fairview Property Subject to Mortgage Interest (Dkt. 1159) is **DENIED**. The proceeds from the sale of the Fairview Property may be released to the receivership estate.

DONE AND ORDERED at Tampa, Florida, on April 15, 2015.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record