How to Prevent Frivolous Appeals from Derailing Receivership Sales of Rhode Island Real Estate

By Daniel E. Burgoyne and Christian R. Jenner

A pair of recent decisions from the Rhode Island Superior Court's Business Calendar, authored by Associate Justices Richard J. Licht and Brian P. Stern, demonstrate how a secured lender in a receivership can combat frivolous appeals that might otherwise threaten a sale of its real estate collateral.

In a receivership involving real estate, the receiver will typically hire a broker to market a property for sale and solicit offers. If multiple offers are received, the receiver may conduct an auction. Once the receiver receives an acceptable offer or completes an auction, it will ask the Court to approve the prospective sale. If the Court finds that the process was commercially reasonable and the sale is otherwise acceptable, then it will enter an order approving the sale (a "Sale Order").

Sometimes an aggrieved party—for example, an occupant of the real estate, a party on the hook for a deficiency, or perhaps a competing bidder—will appeal a Sale Order. Such an appeal will likely prevent the closing, because most title insurers will not issue a policy until potential appeals are exhausted, and most buyers (and lenders) will not close without title insurance. Thus, an aggrieved party can expect to delay a prospective sale, or prevent it altogether, simply by filing a one-page notice of appeal and paying a $150 filing fee.

In the federal bankruptcy context, Congress solved this issue by enacting 11 U.S.C. § 363(m). Under this statute, unless the appellant meets strict criteria and persuades a judge to halt the sale pending appeal, then the eventual reversal of a Sale Order on appeal will not invalidate a completed sale to a good-faith purchaser. No such statute exists in Rhode Island, however. An unscrupulous appellant could conceivably prevent a sale without ever having to demonstrate that its appeal has any merit. The goal would not be to ultimately win the appeal, the resolution of which could conceivably take six to eighteen months. Rather, the goal would be simply to prevent the sale from closing for long enough that the buyer gives up and walks away from the deal.

Judge Licht confronted this problem in *Tinsman v. Velocity NBC, LLC*, No. NC-2020-0123, 2021 WL 924999 (R.I. Super. Ct. Mar. 5, 2021). More recently, Judge Stern addressed the issue in *Flo v. FS Group RI, LLC*, No. PC-2021-03625 (R.I. Super. Ct. April 14, 2022), in which PS&H represented the secured lender. The former case involved a bidder upset that the Court approved a sale to a different bidder. In the latter case, the aggrieved party was a guarantor of the debt secured by the mortgage and a former occupant of the mortgaged real estate who was evicted shortly prior to the planned closing date.

In both cases, the Court granted motions requesting that the appellants procure surety bonds as a condition of pursuing their appeals. If a prospective sale is terminated, "with fluctuations in the real estate market, there is no guaranty that the [receiver] will be able to obtain a similar offer to purchase the Property in a subsequent sale." *Flo*, slip op. at 5. "Practically speaking, even if a similar offer were obtained following an appeal, the potential proceeds are likely to be eroded by real estate taxes, insurance, and other carrying costs." *Id.* Therefore, the surety bonds were designed to provide compensation for likely losses if the buyers walked away from the deals that the Superior Court had approved.

Both Courts relied on their inherent equitable authority and Rule 7 of the Supreme Court Rules of Appellate Procedure, which permits a trial court to enter "orders for … giving bond … and such other orders as are needed for the protection of the rights of the parties until the appeal or petition for review shall be heard and determined by the Supreme Court." A bond appropriately shifts the financial risks and consequences of an unsuccessful appeal to the objecting party, as opposed to the creditors and other parties interested in the

receivership assets. Appellants unwilling or unable to bear those risks should expect their appeals to be dismissed. In *Flo*, the appellant failed to obtain a satisfactory bond, the appeal was promptly dismissed, and the prospective sale closed in a relatively timely fashion.

A bond is not appropriate in every case. In *Flo*, Judge Stern acknowledged Supreme Court precedents which require that any bond requirement "grow out of and be directly related to the appeal which has been taken." *Flo* at 4 (citing *Heuberg v. Goodman*, 75 R.I. 226, 229, 65 A.2d 706, 708 (1949)). In other words, a "bond of the type contemplated by the language in [Rule 7] cannot give moving parties 'an additional right against the complainant,' one 'which they did not have when they were brought into court.'" However, this requirement did not prevent requiring a bond in that case. Indeed, a strong argument can be made that where the party seeking the bond is a secured creditor, the property subject to sale is the collateral for the loan, and the appellant is obligated on the loan, the *Heuberg* criteria are always satisfied.

In receiverships, the real estate sale process involves a significant investment of time and resources. It is frustrating to have that process derailed by a weak or meritless appeal when the end is in sight. A secured creditor can use a bond requirement to defend against meritless appeals, ensure that court-approved sale transactions close in a timely manner, and receive payment sooner.

Partridge Snow & Hahn's Commercial Restructuring, Workouts & Asset Recovery Team is ready to answer questions regarding the implications of this decision. For more information, contact Attorney Daniel E. Burgoyne or Christian R. Jenner.

Editorial Note: Shortly after publication, the issue described in this article was addressed by enactment of the Rhode Island Commercial Receivership Act as described in the Client Alert linked here.

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