IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

Case No. 3D10-2047
L.T. Case No. 07-43672 CA 09

ALEX BISTRICER, as limited partner of GULF ISLAND RESORT, L.P. and GULF ISLAND RESORT, L.P.,

Appellants/Petitioners,

vs.

OCEANSIDE ACQUISITIONS, LLC, a Florida limited liability company,

Appellee/Respondent.

Appeal From The Circuit Court Of The Eleventh Judicial Circuit In And For Miami-Dade County, Florida

---

REPLY BRIEF OF APPELLANTS/PETITIONERS

Maurice J. Baumgarten, Esq.
ANANIA, BANDKLAYDER,
BAUMGARTEN & TORRICELLA
100 Southeast Second Street, Suite 4300
Miami, Florida 33131-2144
Telephone: (305) 373-4900
Facsimile: (305) 373-6914
Counsel for Appellants/Petitioners

TABLE OF CONTENTS

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

TABLE OF CITATIONS

Cases

Other Authorities

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

INTRODUCTION

Appellee/Respondent Oceanside Acquisitions, LLC ("Appellee" or "Oceanside") devotes all but two pages of its 19-page Answer Brief to addressing issues and arguments that Appellants/Petitioners, Alex Bistricer ("Mr. Bistricer"), as limited partner of Gulf Island Resort, L.P., and Gulf Island Resort, L.P. ("GIR")(collectively, "Appellants") did not raise in their Initial Brief. Furthermore, the only relevant case that Appellee cites in its Answer Brief, *Shubh Hotels Boca, LLC v. Federal Deposit Ins. Corp.*, 43 So. 3d 163 (Fla. 4th DCA 2010)("*Shubh* Case"), makes it abundantly clear that the trial court had no authority to permit the Receiver to sell the Subject Units or any of the other Building I Units in the absence of a non-appealable "final judgment" quieting title to those Units in favor of Oceanside.

All undefined capitalized terms used herein have the meaning attributed to them in Appellants' Initial Brief. All emphasis is added unless otherwise noted.

ARGUMENT

The Trial Court Did Not Have the Authority to Permit the Receiver to Sell the Subject Units and Relegate GIR to Enforcing its Ownership Rights Against the Proceeds from the Sale of those Units in the Event GIR Prevails in the Quiet Title Action

Oceanside takes the rather curious position that the "real" issue before this Court is whether J. Bagley properly denied Appellants' request for a stay of J. Wilson's September 1, 2009 Order ("Sept. 1, 2009 Order"), pending the outcome of the appeal

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

in the Quiet Title Action. That Order authorized the Receiver to enter into negotiations with prospective purchasers of units that are titled in Oceanside's name but which GIR contends belong to it (Answer Brief ("An. Br."), p. 8). Aside from the fact that Appellants' notice of appeal specifically states that it is an appeal from J. Bagley's July 30, 2010 Order approving two sales contracts between the Receiver and Mr. Linville regarding the Subject Units, and does not even mention the Sept. 1, 2009 Order, Oceanside's contention is irrelevant. [1] Whether or not this Court deems this matter to be an appeal from J. Bagley's July 30, 2010 Order approving of the sale of the Subject Units to Mr. Linville, or deems this matter to be an appeal to be from J. Bagley's denial of Appellants' request that the trial court stay J. Wilson's Sept. 1, 2009 Order, the issue before this Court is the same: Did the trial court have the authority to permit the

---

[1] In fact, neither the Sept. 1, 2009 Order nor J. Bagley's July 30, 2010 Order denying Appellants' request for a stay of that Order were appealable under the Florida Rules of Appellate Procedure (the "Rules") because: (a) neither Order was a final order within the meaning of the Rules; (b) neither Order determined the right to immediate possession of property within the meaning of Fla. R. App. Pro. 9.130(a)(3)(C)(ii); and (c) neither order resulted in the transfer of any property to Mr. Linville or anyone else. The Sept. 1, 2009 Order simply authorized the Receiver to enter into negotiations with unidentified prospective purchasers for the sale of units that were titled in Oceanside's name, which sales could not take place absent the Court's approval of the proposed sale agreements. The only order regarding the Receiver's authority to sell the Subject Units which was appealable was J. Bagley's July 30, 2010 Order approving the sale of the Subject Units to Mr. Linville, because that Order resulted "in the immediate transfer of possession and ownership" of the Subject Units. *See* Fla. R. App. P. 9.130(a)(3)(C)(ii). *Accord Shubh*, 43 So. 3d at 165 (holding that court had appellate jurisdiction over non-final order authorizing receiver's sale of mortgaged property).

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

Receiver to sell the Subject Units or any of the other Building I Units in the absence of a non-appealable "final judgment" quieting title to those Units in favor of Oceanside? Appellants respectfully submit that the answer to that question is "No."

Rather than addressing that issue, Oceanside devotes all but the last two pages of its Answer Brief to arguing that the sale of the Subject Units to Mr. Linville was a sound business decision. However, whether or not the sale of the Subject Units (as opposed to renting out those Units until the real estate market in Florida rebounds) is or is not a good idea (it is not), has nothing to do with the issue of whether the trial court had the authority to permit the Receiver to sell the Subject Units to Mr. Linville, and relegate GIR to enforcing its ownership rights against the proceeds from the sale of the Subject Units in the event it ultimately prevails in the Quiet Title Action. The fact is that regardless of how much "sense" the Receiver believes it makes to sell the Subject Units now, he has no more right to do so and permanently deprive GIR of its ownership rights in those Units, than he would have to sell property owned by anyone else based on his belief that such a sale would be in the best interest of that property owner.

Because none of the alleged facts or arguments that Oceanside includes in its Answer Brief, with the exception of its argument in Section II(D), relate to the issue of

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

the Receiver's right to sell the Subject Units, they are irrelevant.[2] What is relevant is that under the applicable law, including the *Shubh* Case that Oceanside cites in its Answer Brief, it is abundantly clear that the Receiver was not authorized to sell the Subject Units absent a final judgment that the Subject Units were properly titled in the name of Oceanside, and relegate GIR to asserting its ownership rights in those Units against the proceeds from the sale of those Units.

In its Answer Brief, Oceanside does not discuss, let alone even attempt to distinguish, any of the legal authorities that Appellants cite in their Initial Brief which stand for the proposition that a receiver may not dispose of property on behalf of a receivership in the absence of a prior, non-appealable final determination that the subject property is in fact receivership property. Nor does Oceanside discuss the legal authorities which stand for the proposition that the trial court could not, over GIR's objection, order that the Subject Units be sold free and clear of GIR's claim that it is the rightful owner of those Units and transfer GIR's ownership interests in the Subject Units to the proceeds from said sale, irrespective of whether or not GIR is determined to be the rightful owner of the Subject Units. Instead, Oceanside cites only the *Shubh*

---

2 For this reason, Appellants will not burden the Court with a discussion of the numerous inaccuracies set forth in Oceanside's recitation of the facts in its Answer Brief, including, but not limited to, inaccuracies regarding the merits of Appellants' appeal from the Contempt Judgment that J. Cobb entered in the Quiet Title Action.

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

Case, and contends that a "negative implication" of that case is that a receiver may sell receivership property over the objections of a party claiming that it is the owner of the subject property, where a statute authorizes such sale and there has been no objection by the record owner (An. Br. pp. 18-19). The fact is, however, that not only is there no such implication from the *Shubh* Case, the *Shubh* Case actually supports Appellants' assertion that the Receiver was not authorized to sell the Subject Units over GIR's objection, in the absence of a non-appealable final determination that the Subject Units in fact are rightfully titled in the name of Oceanside.

In the *Shubh* Case, which was published after Appellants served and filed their Initial Brief, the Fourth District Court of Appeal held that a receiver did not have the authority to sell mortgaged property on behalf of the lender where the property owner objected to the sale of the property and the lender had not yet obtained a final judgment of foreclosure in its favor. Nowhere in the *Shubh* Case does the Court even come close to suggesting that, contrary to the holdings of *Darby v. Zimmerman*, 323 B.R. 260, 268 (9th Cir. 2005), *Warnick v. Yassian (In re Rodeo Canon Dev. Corp.)*, 362 F. 3d 603, 605-06 (9th Cir. 2004), *McCollum v. Malcomson*, 358 N.E. 2d 177, 179-180 (Ind. Ct. App. 1976), and *Stegall Milling Co., Inc., E.P. Hettiger*, 217 S.E.2d 767 (N.C. Ct. App. 1975), a receiver is authorized to sell property which he claims is receivership property over the objections of a party claiming that it, not the receivership, owns the

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914

subject property.[3]

The reference in the *Shubh* Case to the absence of statutory authority permitting a receiver to sell mortgaged property prior to a final foreclosure judgment also is of no import because, contrary to Oceanside's suggestion in its Answer Brief, there is no legal authority that permits a receiver to liquidate property where there is a dispute as to whether the subject property is receivership property. Fla. Stat. §517.191(2), cited by Oceanside, provides only that a court is authorized to "appoint a receiver or administrator **of the property, assets, and business of the [receivership]**" who has the authority to liquidate **said property**." The statute simply provides that a receiver has the authority to liquidate property that **in fact belongs to the receivership**. The statute does not authorize a receiver to liquidate property where another party claims that it is the owner of the property and where a non-appealable final judgment determining that the subject property belongs to the receivership has not been entered.

The fact is that the *Shubh* Case actually supports Appellants' contention that the Receiver is not authorized to sell the Subject Units in the absence of a non-appealable final judgment that the Subject Units were properly titled in Oceanside's name. In holding that the receiver was not authorized to sell the mortgaged property over the

[3] The *Shubh* Case refers to the objection of the **record** owner only because the dispute in that case happened to be between the lender and the record owner. There was no dispute in the *Shubh* Case, as there is here, between the record owner and a

owner's objection, the *Shubh* Court notes as follows:

> [T]he general Florida rule is that the mere appointment of a receiver does not itself confer any of the owner's power or authority to sell such property" (citing *Eppes v. Dade Developers, Inc.*, 126 Fla. 353, 170 So. 875 (Fla. 1936)("**appointment of receiver does not affect title to property; receiver is officer of court whose appointment does not deprive owner of rights, receiver merely holds for rightful owner until matter is determined**").

Shubh, 46 So. 3d at 165, 167. The Fourth District Court of Appeal further noted that permitting a receiver to sell mortgaged property prior to a final foreclosure judgment would "contravene" a mortgagor's "statutory" right of redemption which continues even after there has been a post-judgment foreclosure sale. *Id.*

Here too, the mere fact that a receiver was appointed for Oceanside does not affect GIR's title rights in the Subject Units, does not give the Receiver the right to deprive GIR of its ownership rights in the Subject Units in the event Appellants prevail in the Quiet Title Action, and does not give the Receiver the right to relegate GIR to asserting its ownership rights in the Subject Units against the proceeds from the sale of those Units.

CONCLUSION

Based on the above reasoning and authorities, as well as the reasoning and authorities set forth in their Initial Brief, the Appellants, ALEX BISTRICER, as

---

prior owner party claiming that it still is the rightful owner of the property.

limited partner of GULF ISLAND RESORT, L.P., and GULF ISLAND RESORT, L.P., respectfully request that this Court enter an order either vacating the July 30, 2010 Order of the Trial Court, or staying that Order pending the conclusion of the Quiet Title Appeal in Case No. 3D09-3002.

Respectfully submitted,

Anania, Bandklayder, Baumgarten & Torricella
Attorneys for Appellants/Petitioners
4300 Miami Tower
100 Southeast Second Street
Miami, Florida 33131-2144
Telephone: (305) 373-4900
Facsimile: (305) 373-6914

By: _____
Maurice J. Baumgarten
Florida Bar No. 525324

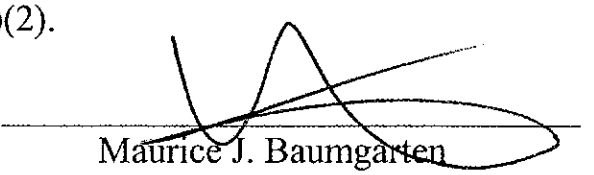
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via U.S. Mail this 6th day of January, 2011 to: James D. Gassenheimer, Esq., Berger Singerman, 200 South Biscayne Boulevard, Suite 1000, Miami, FL 33131.

_____
Maurice J. Baumgarten

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief of Appellants has been prepared using Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).



Maurice J. Baumgarten

ANANIA, BANDKLAYDER, BAUMGARTEN & TORRICELLA
BANK OF AMERICA TOWER, SUITE 4300, 100 S.E. SECOND STREET, MIAMI, FLORIDA 33131-2144 • TELEPHONE (305) 373-4900 • FACSIMILE (305) 373-6914