

**IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA**

CASE NO.: 07-43672 CA 09

STATE OF FLORIDA, OFFICE OF
FINANCIAL REGULATION,

Plaintiff,

v.

BERMAN MORTGAGE CORPORATION,
a Florida corporation, M.A.M.C.
INCORPORATED, a Florida corporation,
DANA J. BERMAN, as Owner and
Managing Member,

Defendant,

and

DB ATLANTA, LLC, a Florida limited
liability company, et al.,

Relief Defendants.

**RECEIVER'S MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING
THE RECEIVER TO SELL OCEANSIDE UNITS FREE AND CLEAR
OF ALL LIENS, CLAIMS AND ENCUMBRANCES;
(II) APPLY SALE PROCEEDS TO REAL PROPERTY TAXES; AND
(III) ESCROW BALANCE OF PROCEEDS PENDING DETERMINATION
OF PRIORITY OF LIENS IN FORECLOSURE CASE**

Michael I. Goldberg, the receiver (the "Receiver") for Defendants Berman Mortgage Corporation ("BMC"), M.A.M.C. Incorporated ("MAMC"), and Relief Defendants DB Atlanta, LLC, *et al.*, hereby files this Motion for Entry of an Order (I) Authorizing the Receiver to Sell Oceanside Units Free and Clear of all Liens, Claims and Encumbrances; (II) Apply Sale Proceeds to Real Property Taxes; and (III) Escrow Balance of Proceeds Pending Determination

of Priority of Liens in Foreclosure Case (the "Motion"). In support of the Motion, the Receiver states as follows:

1. On December 11, 2007, the Florida Office of Financial Regulation ("OFR") filed a Complaint for Temporary and Permanent Injunction and Appointment of Receiver.

2. The OFR alleged that BMC had brokered the funding of at least \$192 million in mortgage loans from approximately 700 private investors (the "Lenders") by offering fractional interests in short-term acquisition and/or construction mortgage loans. MAMC serviced the loans pursuant to servicing agreements entered into between the individual Lenders and MAMC.

3. On December 11, 2007, this Court (the "Receivership Court") appointed Michael Goldberg as the receiver for BMC, MAMC and the Relief Defendants (collectively, the "Receivership Defendants").

4. Oceanside Acquisitions, LLC ("Oceanside") is one of the original Relief Defendants. Oceanside is an entity formed by Dana Berman and Keith Novak to purchase certain of the condominium units (the "Oceanside Units") located at the Gulf Island Resort & Tennis Club ("Gulf Island Resort") in Pasco County, Florida.

5. In 2003, Oceanside borrowed \$1,700,000 from thirty-eight of the Lenders to fund the purchase of the Oceanside Units. The loans were secured by the Oceanside Units and other related property as evidenced by the loan documents, including a First Mortgage and Security Agreement and a Second Mortgage and Security Agreement (jointly, the "Mortgages") recorded in the Official Records of Pasco County. The loans were serviced by MAMC and are in default.

6. Pursuant to the Receivership Order, the appointment of the Receiver was necessary to prevent waste and dissipation of the assets of the Receivership Defendants to the

detriment of the Lenders. To that end, it is the Receiver's responsibility to sell the Oceanside Units and use the proceeds of the sale to reimburse the Lenders for their investments.

7. However, in addition to the Mortgages, other liens, claims and encumbrances have been asserted against the Oceanside Units. The real property taxes (the "Taxes") for 2006 and 2008 – 2012 remain unpaid. According to the web site for the Pasco County Tax Collector, as of September 1, 2013, the amount of Taxes range from \$22,860 to \$25,125 for each of the Oceanside Units. Except for the 2006 taxes, where tax certificates have been sold,¹ the unpaid taxes accrue interest at 18% per year.

8. The Gulf Island Beach and Tennis Club Condominium Association, Inc. (the "Association") asserts claims against the Oceanside Units based upon unpaid maintenance fees and special assessments (the "Assessments"). Upon information and belief, the outstanding Assessments are at least \$40,000 per unit, which includes interest and late fees. Attorney's fees and costs will further increase the total amount of the Assessments.

9. Upon motion and hearing, the Receivership Court has previously authorized the sale of individual units. Due to the conditions of the units and the market for real estate sales, recent sales have revealed that in the event the Receiver must pay the Association's costs and fees, there is little equity in the units. For example, in December of 2012, the Receivership Court authorized the sale of Oceanside Unit 401. The unit was scheduled for sale at \$90,000. The Taxes, Assessments and closing costs were \$85,000. (The Receiver was only able to recover funds for the Lenders through a related sale of a dock slip and parking space.)

10. In August of 2013, the Receivership Court entered an Order authorizing the Receiver to initiate a lawsuit to foreclose² the Lender's Mortgages and other claims, liens and

¹ The relevant interest rate for redemption of the tax certificates is 5%.

² The Receiver anticipates filing the foreclosure case within the next week.

encumbrances. The Association has taken the position that the Assessments hold a higher priority for payment than the Mortgages. Due to the dispute with the Condominium Association, the Receiver anticipates that the foreclosure case may be a drawn out proceeding.

11. In the interim, individuals have expressed interest in purchasing certain of the Oceanside Units. The Receiver desires to sell the Oceanside Units free and clear of all liens, claims and encumbrances, in order to provide buyers with clear title.

12. In the event the Receiver sells any of the Oceanside Units, the Receiver seeks authority from the Court sell the Oceanside Units free and clear of all liens, claims and encumbrances and to apply the proceeds of the sale(s) ("Sale Proceeds") to the Taxes. After the Taxes are paid in full (including the 2013 Taxes), the Receiver shall hold any remaining Sale Proceeds in escrow pending conclusion of the foreclosure case and further Order of the Receivership Court. Thus, if it is later determined in the foreclosure case the Association's claims have priority over the Mortgage holders' liens, the Association will be entitled to the escrowed proceeds. If it is determined that the Mortgage holders' liens have priority over the Association's claims, the Mortgage holders will be entitled to the escrowed proceeds.

LEGAL BASIS FOR SALE FREE AND CLEAR OF LIENS

When faced with similar legal disputes, receivership courts have applied bankruptcy law. In *S.E.C. v. Kirkland*, 6:06-CV-183-ORL, 2008 WL 4491528 (M.D. Fla. Sept. 30, 2008), a federal court receivership case, the judge applied Section 363 of Title 11 of the U.S. Code (the "Bankruptcy Code") to a dispute over the sale of real property free and clear of liens. The objective of Section 363 of the Bankruptcy Code applies in this dispute and provides a guide for the Receivership Court to authorize the sale of the Oceanside Units free and clear of all liens, claims and encumbrances.

Pursuant to 11 U.S.C. § 363(f), a trustee may sell property of the estate “free and clear of any interest in such property of an entity other than the estate, only if—(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; ... (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” 11 U.S.C. § 363(b), (f). Since the five conditions listed in 11 U.S.C. § 363(f) are phrased in the disjunctive, property may be sold free and clear of interests if any one of the five conditions is satisfied. *In re WBQ Partnership*, 189 B.R. 97 (Bankr.E.D.Va.1995). *In re Gulf States Steel, Inc. of Alabama*, 285 B.R. 497, 506 (Bankr. N.D. Ala. 2002).

Bankruptcy Code Section 363(f)(4) allows a sale to proceed free and clear of any interest if the interest is in bona fide dispute.³ The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the estate “so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.” *In re Gulf States Steel, Inc.*, 285 B.R. 497, 507 (Bankr.N.D.Ala.2002)(quoting *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (9th Cir. BAP 2001)). See also, *In re Durango Georgia Paper Co.*, 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005). “Typically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute; such procedure preserves all parties' rights by simply transferring interests from property to dollars that represent its value.” *Clark*, 266 B.R. at 171.

This Receivership Court has previously authorized the sale of certain of the Oceanside Units free and clear of liens, claims and encumbrances. See *Order Granting Receiver's Motion*

³ The court is not required to determine the underlying dispute or determine the probable outcome, rather only that a dispute does in fact exist. *Gulf States*, 285 B.R. at 507 – 508; See also *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr.N.D.Ill.1991); *In re Taylor*, 198 B.R. 142, 162 (Bankr.D.S.C.1996); *In re Collins*, 180 B.R. 447, 452 (Bankr.E.D.Va.1995).

to Sell the Property of Oceanside Acquisitions, LLC Free and Clear of Liens, Claims and Encumbrances, dated September 1, 2009. The Receiver believes that the Receivership Court should continue this practice. It is also in the best interest of the Lenders and the Association to satisfy the Taxes from the proceeds of the sale(s). There is no dispute that the Taxes remain unpaid, continue to accrue interest on a monthly basis and are superior to the interests of the Lenders and the Association. See *Horn v. City of Miami Beach*, 142 Fla. 178, 194 So. 620 (1940) (All liens for ad valorem taxes including all valid tax sale certificates are first liens upon property taxed, superior to all other liens acquired under State laws, and are of equal dignity without priorities among them as to taxing units or as to years for which taxes were imposed). The Taxes continue to accrue and incur interest at a steep rate, which is depleting the equity available for both the Association and the Mortgage holders. Accordingly, it is in the best interests of all parties to pay the Taxes.

WHEREFORE, Michael I. Goldberg, in his capacity as Receiver, respectfully request this Court enter an Order authorizing the relief requested herein and such further relief as is just and proper.

Respectfully submitted,

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By: /s/ Joan M. Levit
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2013, a true and correct copy of the forgoing was furnished via e-mail and U.S. Mail to the parties on the attached Service List. A copy of the Motion will also be sent to the Lenders who have an interest in this property by e-mail and posted on the receivership website.

By: /s/ Joan M. Levit
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