

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

GENERAL ELECTRIC CAPITAL CORPORATION,)	
)	
)	No. 3:08-cv-01229
Plaintiff,)	Judge Trauger
)	Magistrate Judge Griffin
vs.)	
)	
VIVID RESTAURANT CONCEPTS, LLC,)	
)	
Defendant.)	

RECEIVER’S MOTION FOR LIMITED RECONSIDERATION

Kevin T. O’Halloran, Receiver (the “Receiver”) for VIVID Restaurant Concepts, LLC (“VIVID”), respectfully moves, pursuant to Local Rule 8(b)(3), for reconsideration of this Court’s Order of June 9, 2009, permitting Corona Development, LLC (“Corona”) to intervene and file its Complaint in intervention (the “Intervening Complaint”), including against the Receiver, on the limited grounds that the Receiver is provided with immunity for his actions in discontinuing operations at the Knoxville location and otherwise in connection with the Corona lease.

The Receiver does not contest Corona’s right to intervene in this receivership proceeding for purposes of establishing its claim, if any, against the receivership estate arising from its rejected lease. While the Receiver disputes the allegations made in the Intervening Complaint regarding the substance and amount of Corona’s claim, and will timely answer same, the Receiver respectfully submits that the Intervening Complaint improperly seeks relief against the Receiver for actions taken in furtherance of the duties and responsibilities imposed upon him by order of this Court. In support thereof, the Receiver respectfully states as follows:

BACKGROUND

By order entered on January 9, 2009 (as amended on January 12, 2009), the Receiver was appointed receiver over all property of Vivid Restaurant Concepts, LLC (“Vivid”), including its restaurant operations at various locations (the “Receivership Property”), which (at the time) included an Amerigo restaurant in Knoxville, Tennessee. RECEIVER ORDER at ¶ 1.¹ Among the discretionary functions and authority granted to the Receiver were the operation and management of the restaurants, including termination of leases or other agreements affecting or relating to any of the restaurants. RECEIVER ORDER at ¶ 2(a), (b) and (k). The Receiver was expressly precluded from paying any taxes incurred prior to his appointment. RECEIVER ORDER at ¶ 2(d).

The Receiver Order did not impose a specific time line for the Receiver to evaluate restaurant operations or to make any decisions with respect thereto. Rather, the Receiver provided that the Receiver’s control would continue “during the pendency of [the] litigation or until further order of the Court”, and that the Receiver would have, during that time, “all authority usually granted to receivers in the operation and management of [the restaurant] business”. RECEIVER ORDER at ¶ ¶ 1 and 2(a). The Receiver acted promptly and reasonably in soliciting and finding a potential buyer for the restaurants and a sale of substantially all of the receivership assets is pending before this Court.

For a period of time, the Receiver operated the Knoxville location and timely paid the obligations associated with such operations, including payment of post-receivership rent to Corona. See RECEIVER’S MONTHLY FINANCIAL REPORTS FOR JANUARY 2009 THROUGH APRIL 2009 (Docket Nos. 33, 35, 37, and 43). However, as the Knoxville location continued to lose

¹ All references are to the Amended Order for Appointment of Receiver entered at Docket Number 15 on January 12, 2009. Referenced paragraphs are to the enumerated ordered provisions found beginning at page 2.

money, the Receiver determined that discontinuing operation of that restaurant was in the best interests of the receivership estate as a whole, and shut down the restaurant on April 28, 2009. See RECEIVER'S MONTHLY FINANCIAL REPORT FROM 4/1/09 TO 4/30/09 at p. 22 (Docket No. 43)(describing disposition of inventory from Knoxville location).

Corona sought intervention in this receivership proceeding to assert claims under its rejected lease. The Court permitted Corona to intervene and file its Complaint in intervention by Order entered on June 9, 2009.

LEGAL ARGUMENT

As noted by the U.S. District Court for the Eastern District of Tennessee, “[f]ederal courts applying federal law have unanimously held that court-appointed receivers and other officials who act on behalf of a court enjoy absolute derivative judicial immunity for acts taken within the scope of authority granted to them by court order.” *NPF IV, Inc. v. Servicemaster Diversified Health Services, L.P.*, 1998 WL 1073910 at *3 (E.D. Tenn. 1998) citing *Smith v. Martin*, 542 F.2d. 688, 690-91 (6th Cir. 1976), cert. denied, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed. 388 (1977)(other citations omitted). As long as the challenged acts are within the scope of a receiver’s authority and are not malicious or corrupt, the receiver is entitled to judicial immunity. *Plassman v. City of Wauseon*, 85 F.3d 629, 1996 WL 254662 at *7 (6th Cir. 1996) citing *Smith v. Martin, supra*. The Sixth Circuit has cited with approval the approach in other circuits that a receiver is provided with immunity so long as he acts in good faith within the scope of his granted authority. *Id.* (citations omitted).

Corona has failed to allege that the Receiver acted outside the scope of his authority in shutting down the Knoxville operations as unprofitable.² That Corona did not agree to allow the termination of its lease is not determinative.

The principles governing executory contracts in receivership proceedings are well-established and long-standing. Those principles are that: (i) the receiver is not bound by an executory contract existing at the time of his appointment; (ii) the receiver is entitled to a reasonable time within which to determine whether a particular contract should be adopted or assumed; and, (iii) when the receiver has possession of and uses property subject to a contract in carrying on business pending determination of disposition of the contract, he must reasonably compensate the other contracting party. *See Universal Rim Co. v. Scott*, 21 F.2d 346, 349-50 (N.D. Ohio 1924)(discussing at length 6th Circuit and Supreme Court opinions).

The Receiver acted in good faith in all aspects of his operation and closing of the Knoxville Amerigo restaurant. The Receiver timely paid the operating expenses for the restaurant and timely paid rent for February, March, and April.³ The Receiver timely made a decision to shut down the Knoxville restaurant and not attempt to assign the Corona lease through the pending sale.

After closing the restaurant, the Receiver properly vacated the premises and properly disposed of the remaining inventory. The photographs attached hereto show that the premises were left clean and orderly. *See* Exhibit 1. The Receiver's financial report for April shows that the Knoxville food inventory was disposed of or removed, including moving the non-perishable food to another restaurant and donating the rest to charity. The Knoxville liquor inventory was

² Corona will have a claim against the receivership estate for any allowed claims in connection with its rejected lease.

³ The rent obligation for January was a pre-receivership obligation, as were the taxes associated with the lease for which Corona makes a claim.

disposed of by returning some to the vendor and destroying the rest (that had been opened), all in accordance with requirements of Tennessee liquor laws. See RECEIVER'S MONTHLY FINANCIAL REPORT FROM 4/1/09 TO 4/30/09 at p. 22 (Docket No. 43).

The Receiver acted fully within the scope of his authority and in good faith in operating the Knoxville Amerigo restaurant and in shutting that restaurant down (and vacating the leased premises) to avoid any further detriment to the receivership estate or its other creditors from continuing losses from operations. Accordingly, the Receiver is entitled to immunity, and Corona's claims against him in the Intervening Complaint are not properly asserted.

WHEREFORE, the Receiver respectfully requests that the Court reconsider its Order of June 9, 2009 permitting Corona to intervene by limiting the Intervening Complaint to claims in the receivership proceeding and such other relief as may be necessary and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via the Court's CM/ECF electronic system to:

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on this 19th day of June, 2009.

s/ Barbara D. Holmes
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