

NOTICE  
Decision filed 08/25/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150400-U

NO. 5-15-0400

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

FB ACQUISITION PROPERTY I, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 13-CH-81
	)	
DDD, LLC,	)	Honorable
	)	Stanley Brandmeyer,
Defendant-Appellant.	)	Judge, presiding.

---

PRESIDING JUSTICE SCHWARM delivered the judgment of the court. Justices Welch and Chapman concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Trial court's decision distributing remaining funds held by receiver to the mortgagee was proper because the funds were provided by the mortgagee to the receiver while the property operated at a net loss and the receiver had not used the funds for the benefit of the receivership property.
- ¶ 2 The defendant, DDD, LLC, appeals the order of the circuit court of Marion County requiring an appointed receiver to distribute funds remaining after the settlement of a foreclosure action to the plaintiff, FB Acquisition Property I, LLC (FB Acquisition). For the following reasons, we affirm the circuit court's order.

¶ 3

## BACKGROUND

¶ 4 On January 2, 2002, DDD acquired a loan for \$1,250,000, evidenced by a promissory note, which was secured by a mortgage of hotel property formerly known as the GuestHouse Inn in Salem, Illinois. The mortgage provided, among other things, that DDD pledged a security interest in all of the rents for the property. The mortgage further provided that, upon DDD's default:

"Lender shall have the right to be placed as mortgagee in possession or to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of receivership, against the Indebtedness."

¶ 5 On August 30, 2013, Scarlet Portfolio, LLC, filed a complaint seeking to foreclose DDD's mortgage of the hotel property. Count I of the complaint sought foreclosure of the mortgage on the property, and counts II-IV were based on breaches of the guaranties of the loan.

¶ 6 On January 21, 2014, the circuit court entered its order appointing Jeff Kolessar as receiver of the property and authorizing the receiver to take possession and control of the property to prevent waste and to preserve, manage, secure, and safeguard the property. The circuit court ordered that DDD shall have "neither possession nor control of, or any right to Income (as defined below) derived from the Receivership Property." The term "Income" was defined as "collectively all cash, cash on hand, checks, cash equivalence [*sic*], credit card receipts, demand deposit accounts, bank accounts, cash management or

other financial accounts, bank, security, advance or other deposits and all other cash collateral \*\*\*; current and past due earnings, revenues, rents, issues and profits, accounts or accounts receivable \*\*\*; all claims to rent, issues, profits, income, cash collateral and all other gross income derived with respect to the Property or business operations of the Property regardless of whether earned before or after entry of this Order."

¶ 7 In section 5.6, under the subheading "Extent of Receiver's Authority," the court's order appointing the receiver recited the following:

"All advances to the Receiver by the Plaintiff for the benefit of the Receivership Property, including any advances for working capital or improvements and any other costs and expenses incurred by the Receiver under this Order shall be deemed protective advances under the Mortgage. Any such protective advance shall be fully secured by Plaintiff's first priority mortgage lien and security interest against the Property. Any and all funds advanced by Plaintiff to the Receiver pursuant to this Order shall: (a) be deemed made pursuant to contract; (b) be added to the amount of the indebtedness owed by Defendants to Plaintiff; (c) be deemed secured by the liens and security interests in favor of Plaintiff under the loan documents on the Receivership Property to the same extent and with the same priority as other indebtedness secured by all existing liens and security interests under the loan documents in favor of Plaintiff; and (d) accrue interest at the interest rate provided under the loan documents in favor of Plaintiff. \*\*\*."

¶ 8 Under the subheading "Term and Final Accounting," section 7.3 of the order provides as follows:

"Immediately upon termination of the Receivership, the Receiver shall turnover [sic] to Plaintiff or its designee \*\*\*, all of the Receivership Property unless otherwise ordered by the Court."

"Receivership Property" is defined in section 8 of the order appointing the receiver to include "income."

¶ 9 On August 4, 2014, the circuit court entered an order of summary and default judgment of foreclosure and sale. The circuit court entered default judgment against named defendants who had failed to answer the amended verified complaint and entered summary judgment against DDD. The circuit court granted judgment in favor of Scarlet Portfolio in the amount of \$953,346.84, plus attorney fees and costs under count I of the amended verified complaint. The court ordered that the property be sold to satisfy the amount due and owing Scarlet Portfolio.

¶ 10 On January 29, 2015, FB Acquisition was substituted for Scarlet Portfolio. On April 27, 2015, the circuit court entered an order discharging the receiver. In this order, the circuit court noted that it had entered a previous order allowing the mortgagor defendant until June 2015 to sell the property. The court further noted that the property generally operated at a net loss. The court found that while DDD had attempted to sell the property, FB Acquisition did not wish to cover the expenses. The court discharged the receiver and granted possession of the property to DDD. The court held that FB Acquisition was responsible to pay any outstanding expenses incurred by the receiver prior to the discharge and "if the receiver has any remaining funds on hand after the Final Report and Account, the Court shall direct where those funds shall go."

¶ 11 On May 19, 2015, the parties entered into a settlement agreement and release. In this agreement, DDD agreed to pay FB Acquisition \$720,000 "in full and final settlement of all claims of FB Acquisition and/or Borrowers, and for which any Party may have had in connection with or related to the Loan, including all obligations of Borrowers under the Loan Documents." In the settlement agreement, FB Acquisition agreed to release and fully discharge DDD, and DDD agreed to release and fully discharge FB Acquisition, "from any and all actions, causes of action, demands, debts, suits, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, damages, judgments, deficiency judgments of any kind, assessments, liabilities, losses, obligations, expenses \*\*\*, claims and demands whatsoever, in law or in equity, whether known or unknown, matured or unmatured, \*\*\* ever had, now has, shall or may have or hereinafter attempt to assert \*\*\* that arise from the Loan Documents, as well as any actions or omissions, issue or relationship that has occurred or could have existed from the beginning of time through the execution of this Settlement Agreement." The settlement agreement did not specifically reference remaining funds held by the receiver.

¶ 12 On June 22, 2015, the receiver filed his final report. In his final report, the receiver showed total receipts (from January 29, 2014 until April 19, 2015), including cash deposits, credit card receipts, funds from the plaintiff, and funds from the notebuyer, as \$969,488.08. Considering that the property operated at a net loss, FB Acquisition had provided \$194,223.38 of the \$969,488.08. The receiver reported disbursements (from January 2014 until April 2015), including payroll, paid bills, and bank fees, as

\$884,220.27. The receiver thus reported cash at conclusion of receivership as \$85,267.81.

¶ 13 On July 20, 2015, DDD filed a motion for distribution of funds. Citing the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1704(d) (West 2014)) and the settlement agreement and release, DDD asserted that FB Acquisition had no claim to the funds held by the receiver because it had released DDD from any claims for money that arose from the loan documents. Thus, DDD requested the court to distribute the excess funds of \$85,267.82 to DDD.

¶ 14 On August 28, 2015, the circuit court ordered the receiver to disburse to FB Acquisition the sum of \$84,418.48 as the net funds held by the receiver. On September 25, 2015, DDD filed notice of appeal.

¶ 15 ANALYSIS

¶ 16 DDD argues that, pursuant to section 5.6 of the circuit court's order appointing the receiver, the funds FB Acquisition paid to the receiver were added to the indebtedness owed by DDD; the indebtedness was satisfied by the settlement payment; and therefore, the remaining funds held by the receiver should be disbursed to DDD, as owner of the property.

¶ 17 FB Acquisition argues that the circuit court properly awarded it the remaining funds held by the receiver. FB Acquisition contends that nothing in the settlement agreement provided that it was releasing claims to funds that it entrusted to the receiver to hold until and if needed to cover property-related expenses until the time the receiver was discharged. FB Acquisition also argues that pursuant to the settlement agreement, it

released claims against DDD; however, it seeks the funds it provided to the receiver, not to DDD.

¶ 18 To the extent the issues on appeal require us to construe the Mortgage Foreclosure Law, our review is *de novo*. See *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 165 (2010). Likewise, the interpretation of a settlement agreement is reviewed *de novo*. *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004). However, the court's order regarding disbursement of receipts requires the exercise of discretion and, accordingly, we review that decision for an abuse of discretion. See 735 ILCS 5/15-1704(d)(8) (West 2010) (balance of receipts held by receiver shall be held or disbursed as ordered by the court); see also *Bank of America, N.A.*, 401 Ill. App. 3d at 165 (application of the abuse-of-discretion standard in an appeal involving the Foreclosure Law depends on the issue to be reviewed); *Members Equity Credit Union v. Duefel*, 295 Ill. App. 3d 336, 337 (1998) (trial court's order distributing the surplus from a foreclosure sale reviewed for an abuse of discretion).

¶ 19 A receiver is an officer of the court, appointed to preserve and secure the subject property. *United States Fidelity & Guaranty Co. v. Old Orchard Plaza Ltd. Partnership*, 284 Ill. App. 3d 765, 774 (1996). The Foreclosure Law provides that a receiver shall have possession of the mortgaged real estate during the foreclosure and shall, among other things, collect the rents, issues, and profits from the mortgaged real estate. 735 ILCS 5/15-1704(b)(2) (West 2014). The Foreclosure Law mandates that, to the extent the receiver receives sufficient receipts from the mortgaged real estate, it "shall" perform certain functions, including accepting all rental payments from an occupant of the

mortgaged property and applying receipts to payment of ordinary operating expenses (735 ILCS 5/15-1704(c)(1)-(4) (West 2014)), and "may" perform other functions with those receipts, including holding receipts as reserves and taking other actions necessary to conserve the property (735 ILCS 5/15-1704(c)(5)-(9) (West 2014)). Section 15-1704(d) of the Mortgage Foreclosure Law provides that receipts received from operation of the real estate subject to the mortgage by the receiver shall be applied in the following order of priority: (1) to reimburse the receiver, (2) to pay insurance premiums, (3) to pay management fees, (4) to pay receiver's fees, and (5) to pay expenses and amounts authorized, and "the balance, if any, shall be held or disbursed as ordered by the court." 735 ILCS 5/15-1704(d)(8) (West 2014).

¶ 20 In the present case, the circuit court ordered the remaining funds held by the receiver to be disbursed to FB Acquisition. The record reveals that during the receiver's term, the property operated at a net loss and that FB Acquisition had provided funds in excess of the remaining \$85,267.81 held by the receiver. Accordingly, as noted by FB Acquisition, the receiver's reported balance at the conclusion of the receivership constituted funds provided by FB Acquisition but unused by the receiver. The receiver had not committed or applied these funds to any expenses related to the property, had not committed or applied the funds for working capital, improvements, or any other costs incurred by the property, and therefore, had in no way utilized the funds for the benefit of the property. Pursuant to the settlement agreement, FB Acquisition released DDD from claims it had in connection with or related to the loan documents involving the mortgaged property. See generally *Bernstein v. Department of Human Services*, 392 Ill. App. 3d



875, 895 (2009) (parties terminated effect of prior court decree when they subsequently entered into settlement agreement). FB Acquisition's claim to recoup from the receiver, not DDD, the funds held by the receiver but not committed or applied for the benefit or preservation of the mortgaged property fell outside the scope of the parties' settlement agreement. Indeed, when the parties entered into the settlement agreement, the receiver had not yet filed his report revealing that he held remaining funds provided by FB Acquisition. See *In re Bostwick*, 127 B.R. 419 (Bankr. N.D. Ill. 1991) (generally unanticipated windfalls should inure to the benefit of the creditor, not the debtor). Therefore, the circuit court properly disbursed the balance of funds held by the receiver to FB Acquisition.

¶ 21

#### CONCLUSION

¶ 22 For the reasons stated herein, we affirm the judgment of the circuit court of Marion County.

¶ 23 Affirmed.