

At an IAS Term, Part Comm 5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> day of March, 2014.

P R E S E N T:

HON. ANN T. PFAU,

Justice.

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BNH FIVE PACK LLC and RIMBABITO LLC,

Plaintiffs,

**DECISION and ORDER**

-against-

Index No. 107/2012

HERBERT STODDARD, ET AL.,

Defendants.

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**ANN PFAU, J:**

The following papers numbered read on motions 05 and 07:

	<u>Papers Numbered</u>
Order to Show Cause, Affidavits (Affirmations) in support and Exhibits Annexed on motion seq. 07, which includes papers submitted on motion seq. 05	1 – 3
Affidavits in Opposition and Exhibits Annexed	4 – 7
Affidavit in Reply and Exhibits Annexed	8 – 9

This is a commercial foreclosure proceeding. Amerevision Bridge Solutions, LLC (Amerevision), as successor in interest to defendant Herbert Stoddard, moved to reinstate an earlier motion for an injunction (Underlying

Motion, sequence number 5) it had commenced with an order to show cause dated May 30, 2012. The Underlying Motion had been marked "withdrawn" by a justice of this court on June 25, 2012, apparently by mistake. By an order dated August 8, 2013, I granted Amerevision's motion to reinstate the Underlying Motion, which is decided in accordance with the following.

Amerevision purchased the mortgaged premises, 665 Miller Avenue, Brooklyn, from Stoddard pursuant to a contract dated September 19, 2012 (Contract of Sale, Aff. of Hezi Torati, Ex. 1). The mortgaged premises is a six unit residential building. The Contract of Sale provided that Amerevision would pay off the amounts owed on Stoddard's mortgage. This foreclosure action had already been commenced at the time of the sale. By an order dated March 23, 2013, the court appointed a receiver, Jacob Gold, to take possession of the mortgaged premises, collect rents and otherwise manage the property (Order of Appointment, Torati Aff., Ex. 3). As relevant, the Order of Appointment states that the receiver shall not make improvements or repairs to the property at a cost in excess of \$1,000 without prior order of this court (*id.*, at 4), and the following, on page 6:

NOTWITHSTANDING ANY OTHER PROVISION OF THIS ORDER  
TO THE CONTRARY, THE RECEIVER SHALL NOT APPOINT AN  
ATTORNEY, AGENT, APPRAISER, AUCTIONEER OR  
ACCOUNTANT WITHOUT PRIOR ORDER OF THE COURT.  
(All capitals in original).

According to Torati, Amerevision sought to refinance the property in May 2013 and requested payoff information from plaintiff's counsel. The payoff letter indicated that the receiver had demanded a fee in the amount of \$30,250.

Amerevision objected to the fee, and brought the Underlying Motion by order to show cause to restrain the receiver from performing maintenance, repairs or improvements without prior court order, and removing the receiver from his appointment.

The receiver opposed the motion. He qualified to serve as receiver on May 2, 2013, when he filed the oath and bond (Aff. Of Final Accounting of Jacob Gold, ¶ 2). He collected no rents (Aff. in Opposition of Jacob Gold, ¶ 3). He says that he inspected the premises and found mold, peeling paint and other conditions that required immediate repair. He engaged a contractor, but the contractor was told to leave by a representative of Amerevision (*id.*, at ¶¶ 13-14). Amerevision contends that the contractor was informed that the receiver's authority under the order of appointment did not exceed \$1,000, and he left voluntarily. The contractor returned and performed work sometime after May 20, 2013 (*id.*, ¶¶ 16-17). Before work began, the contractor sent a proposal to the receiver, dated May 14, 2013, with a total proposed cost of \$13,800 for work in apartment 1R only (*id.*, Ex. A). The receiver also retained an attorney, who submitted an invoice in the amount of \$5,772.50 (*id.*). The total amount sought in the receiver's Affidavit Of Final Accounting is \$36,046.25.

Pursuant to a stipulation dated June 3, 2013, so-ordered by Justice Bernard Graham of this court, Gold was relieved of his duties as receiver and directed to file a final accounting (Aff. of Adam Levy, Esq., Ex. ). The parties agreed that \$40,000 was to be held by the receiver's attorney in escrow pending a final

resolution of his claim for fees (Levy Aff, Ex. D). Plaintiff assigned all of its rights to the escrowed funds to Amerevision (*id.*). Amerevision refinanced the property and plaintiff's claim was settled provided, however, that the question of the receiver's compensation was carved out for resolution by the court.

The receiver's accounting identifies four categories of expense: the receiver's fee in the amount of \$12,473.75; managing agent fee in the amount of \$4,000; attorney's fee in the amount of \$5,772.50; and contractor's fee in the amount of \$13,800.

Generally speaking, the Order of Appointment is in the standard form used in Kings County. As relevant, the receiver may not make improvements or substantial repairs to the property at a cost in excess of \$1,000, he is prohibited from incurring obligations in excess of the monies in his hands without the plaintiff's written consent, and he is not authorized to hire an attorney.

As a preliminary matter, those parts of the Underlying Motion seeking to restrain the receiver from performing his duties, and to remove the receiver from his appointment, are denied as moot because he already has been relieved of his duties pursuant to the June 3, 2013 so-ordered stipulation. The only issues remaining are what amount of the escrowed funds must be paid to the receiver, and Amerevision's request for attorneys fees.

In the one month that the receiver managed the property, he did not seek leave of court to perform improvements and repairs, or to hire counsel. The

receiver did obtain an email from plaintiff's attorney indicating that the receiver had permission to expend funds beyond monies in hand (Gold Aff., Ex. 3).

The contractor's invoice, dated May 14, 2013, shows that the work allegedly performed includes removing and replacing kitchen cabinets and a sink with countertop, removing and replacing a bathroom floor, installation of a new vanity mirror in a bathroom, mold removal in a bathroom, "scrape and treat studs", installation of sheetrock and plastering, painting, installation of new light fixtures and a new bedroom door. Amerevision contends that none of this work was authorized or necessary, and it submits photographs of the kitchen cabinets and sink installed that depict scratched, old cabinetry (photographs are annexed to the Aff. of George Robinson, building superintendent). According to the building superintendent, most of the work described in the contractor's invoice was never performed (*id.*).

If the court credits the receiver's contention that the work in fact was done, it remains undisputed that the receiver was not authorized under the Order of Appointment to expend more than \$1,000 on repairs without court approval. The plaintiff authorized the receiver to expend funds not in hand (because the receiver never collected rent), but it could not authorize repairs and improvements made in violation of the Order of Appointment. Accordingly, the receiver may recover \$1,000 for repairs, but the remainder of the expense for repairs and improvements is disallowed.

That part of the receiver's charges sought to pay counsel also is disallowed. The receiver was not authorized to hire counsel under the Order of Appointment without prior court approval (*see* provision of order quoted on page 2, *supra*). "A receiver shall have no power to employ counsel unless expressly so authorized by order of the court." (CPLR 5228[a] and CPLR 6401[b]). Moreover, the work he performed is not of the type typically authorized by the court, such as to take legal action to collect delinquent rents. The attorney's invoice shows that he assisted with the routine steps taken to commence a receivership, such as preparing a notice to attorn and filing for a bond, and he assisted the receiver to fight for his fee in the litigation with Amerevision (Gold Aff. Of Final Accounting, Ex. 1). The receiver does not seek retroactive authorization to hire counsel, and none is granted *sua sponte*.

The receiver also seeks \$4,000 as a managing agent's fee. The receiver did not have court approval to retain a managing agent (Order of Appointment, 6). The receiver does not submit a contract for the managing agent, and the fee sought, in the amount of \$666.67 per apartment for one month, is excessive. Accordingly, the court will not retroactively approve that retention.

The receiver's affidavit makes no mention of funds expended to purchase insurance, although an invoice dated June 10, 2013 is annexed to his affidavit, stating that there is a balance due of \$2,566.64 is due for a policy with coverage beginning June 7, 2013. There is no proof that the receiver paid any money toward insurance, so no allowance is made for this invoice.

Apart from the expenses described above, the only other expense incurred is \$360 for purchasing the bond. The expenditure for the bond is approved.

The receiver seeks a fee in the amount of \$12,473.75 (Gold Aff. Of Final Accounting, ¶ 7). The receiver states that he arrived at this amount by charging \$275 per hour, “together with reasonable costs and expenses” (*id.*, ¶ 4). The commission a receiver is entitled to recover is generally five percent of amounts collected and disbursed, “. . . but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate to his services” (CPLR 8004[a]). In accordance with this rule, the receiver’s commission is approved in the amount of \$100.

Finally, Amerevision seeks costs, fees and reasonable attorney’s fees for the costs associated with this motion. There is no contractual or statutory basis for this demand. New York courts adhere to the “American Rule”, which provides that “in the absence of any pertinent contractual or statutory provision with respect to the recovery of amounts expended in the successful prosecution or defense of an action, each party is responsible for its own legal fees” (*Chapel v Mitchell*, 84 NY2d 345, 349 [1994]). As such, this branch of Amerevision’s motion is denied.

Accordingly, it hereby is

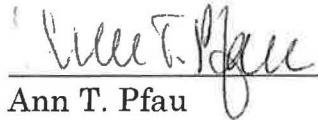
ORDERED that the receiver’s commission is approved in the amount of \$100, and the expenditure for repairs is approved in the amount of \$1,000, and

the expenditure for obtaining a bond is approved in the amount of \$360; and it further is

ORDERED that within ten days of service hereof with notice of entry upon the escrow agent, the escrow agent shall disburse \$1,460 to the receiver, constituting \$100 in commissions plus \$1,360 in reimbursement of expenses, and the balance of the escrowed funds shall be paid to Amerevision; and it further is

ORDERED that this motion (sequence number 07) and the Underlying Motion (sequence number 05) are otherwise denied.

E N T E R,

  
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Ann T. Pfau  
J. S. C.

HON. ANN T. PFAU