

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-6147 RSWL (MRWx) Date March 4, 2013

Title Consumer Financial Protection Bureau v. Chance Gordon, et al.

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Paul Songco

Not Reported

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is a Motion for Order: (1) Approving Temporary Receiver’s Final Report and Accounting; (2) Approving and Authorizing Payment of Fees and Expenses of Temporary Receiver and its Professionals Incurred from Inception of the Receivership Through Closing of the Estate; (3) for Discharge and Release of Temporary Receiver from Liability and Exoneration of its Bond; and (4) for Related Relief (“Motion for Fees & Discharge”) (Docket No. 93). The Motion for Fees and Discharge was filed by Robb Evans & Associates, LLC (“Temporary Receiver”). Plaintiff Consumer Financial Protection Bureau (“CFPB”) supports the Motion for Fees and Discharge. Defendants Chance Gordon and the Gordon Law Firm (collectively “Gordon”) oppose the Motion for Fees and Discharge.

This matter has been referred to this Court due to the unavailability of the judge to whom the action is assigned. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for March 4, 2013, is vacated, and the matter taken off calendar.

The CFPB commenced this action on July 18, 2012. In its Complaint, the CFPB alleges that Gordon and affiliated companies and individuals operate an enterprise that provides mortgage assistance relief services. According to the CFPB, the affiliated companies and individuals constitute an enterprise that operates in a manner that violates provisions of the Consumer Financial Protection Act (“CFPA”), 12 U.S.C. §§ 5531(a), 5536(a), 5564, & 5565, and the Mortgage Assistance Relief Services Rule (“Regulation O”), 12 C.F.R. § 1015. Specifically, the Complaint alleges that defendants have engaged in unfair and deceptive practices by making false and misleading statements when marketing their services, falsely promising consumers that they would obtain mortgage loan modifications and avoid foreclosure, and by erroneously implying that defendants are affiliated with or endorsed by the Government. The Complaint further alleges that defendants violate Regulation O by receiving up-front payments for mortgage assistance relief services from consumers before consumers enter into loan modification agreements with their lenders, advising consumers to stop paying their mortgages despite Regulation O’s requirements that mortgage assistance relief service providers warn consumers that they could lose their homes or damage their credit ratings if they stop paying their mortgages, and urging consumers not to communicate with their lenders.

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The CFPB filed an Ex Parte Application for Temporary Restraining Order (“TRO”) at the same time it filed its Complaint. Among other things, the TRO sought by the CFPB prohibited defendants from continuing to operate the enterprise in violation of the applicable laws and regulations and included the appointment of the Temporary Receiver and an asset freeze. The Court granted the CFPB’s TRO without notice to defendants and, consistent with the TRO, ordered defendants to show cause why a preliminary injunction should not issue. Pursuant to the TRO, the Temporary Receiver took over operation of the enterprise.

Following service of the TRO on defendants, the CFPB and Gordon entered into a stipulation establishing a briefing schedule on the Order to Show Cause why a Preliminary Injunction Should Not Issue (“Preliminary Injunction”). Pursuant to that stipulation, the TRO remained in effect pending the Court’s ruling on the Preliminary Injunction. At the October 22, 2012 hearing on the Temporary Receiver’s Motion for Approval of Interim Fees and Expenses, the Court stated that it would issue a Preliminary Injunction. The Court also indicated that based on the Temporary Receiver’s reports, it did not appear that defendants’ business entities could continue as going concerns. The Temporary Receiver agreed with that assessment. As a result, the Court instructed the Temporary Receiver and CFPB to prepare for the winding-down of the receivership.^{1/} After determining that the CFPB was likely to prevail on the merits, the Court issued the Preliminary Injunction on November 16, 2012. In granting the Permanent Injunction, the Court stated that the Temporary Receiver’s “primary task at this point should be to wind-down Defendants’ operations in the most expeditious and cost-effective manner possible.” Consistent with the terms of the Permanent Injunction, the Temporary Receiver has now filed the Motion for Fees and Discharge after providing notice to potential creditors.

“[A] district court’s power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad.” SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986). “As a general rule, the expenses and fees of a receivership are a charge upon the property administered.” Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994) (citing Atlantic Trust Co. v. Chapman, 208 U.S. 360, 375-76, 28 S. Ct. 406, 411 (1908)); see also CFTC v. Topworth Int’l, Ltd., 205 F.3d 1107 (9th Cir. 1999) (approving distribution plan in which receiver was paid out of assets of the receivership estate). “The court appointing the receiver has full power to fix the compensation of such receiver and the compensation of the receiver’s attorney or attorneys.” Drilling & Exploration Corp. v. Webster, 69 F.2d 416, 418 (9th Cir. 1934).

Receivers have qualified immunity from personal liability for actions that are taken within their receivership authority. Morrison-Knudsen Co. v. CHG Int’l, 811 F.2d 1209, 1222 (9th Cir.1987). Receivers act as an arm of the Court, similar to bankruptcy trustees, and thus enjoy quasi-judicial

^{1/} To avoid the piecemeal resolution of the Temporary Receiver’s requests for fees and expenses, and in light of the imminent winding-down of the receivership, the Court denied without prejudice the Temporary Receiver’s Motion for Approval of Interim Fees and Expenses in favor of this single Motion for Fees and Discharge.

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immunity. See Curry v. Castillo, 297 F.3d 940 (9th Cir.2002) (holding trustee not liable for negligent failure to calendar and give notice of hearing, applying principles of quasi-judicial immunity). In the course of their duties, receivers, like trustees, “are often obliged to make difficult business judgments and the best that disinterested judgment can accomplish with foresight may be open to serious criticism by obstreperous creditors aided by hindsight.” Mosser v. Darrow, 341 U.S. 267, 273-74, 71 S. Ct. 680, 683 (1951). As such, “[c]ourts are quite likely to protect trustees against heavy liabilities for disinterested mistakes in business judgment.” Id. at 274, 71 S. Ct. at 683; see also In re Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir.1983) (stating that “a trustee is not liable in any manner for mistakes in judgment where discretion is allowed”).

Gordon’s primary argument in opposition to the Motion for Fees and Discharge is that the CFPB’s prosecution of this action and the Court’s appointment of the Temporary Receiver are invalid because a recent decision by the United States Court of Appeals for the District of Columbia calls into question the constitutionality of both the appointment of the CFPB’s Director and the promulgation of the regulations that the CFPB alleges Gordon violated. See Canning v. NLRB, Nos. 12-1115 & 12-1153, 2013 WL 276024 (Jan. 25, 2013). Other than asserting in his Answer an affirmative defense raising this issue, this is the first time Gordon has raised this argument in any substantive manner. Importantly, Gordon failed to raise the argument in opposition to the issuance of the Preliminary Injunction. The Court concludes that any questions as to the constitutionality of the CFPB’s prosecution of this action should not delay the Court’s consideration of the Temporary Receiver’s Motion for Fees and Discharge or the payment of the Temporary Receivers fees and expenses out of the receivership estate’s assets.^{2/}

Gordon additionally contends that the Temporary Receiver’s fees and the fees sought by the Temporary Receiver’s counsel are excessive. The Court has reviewed the invoices submitted by the Temporary Receiver and its counsel and the evidence submitted in support of the hourly rates charged by both. The Court concludes that the hourly rates are reasonable. Although Gordon complains about several categories of activities undertaken by the Temporary Receiver and its counsel, and contends that the receivership estate should not be charged for those activities, Gordon has not identified even a single specific time entry that he believes was excessive.

As the Temporary Receiver’s Final Report indicates, the fees and expenses sought by the Temporary Receiver and its counsel constitute an unfortunately large percentage of the entirety of the

^{2/} Should it eventually determine that the CFPB instituted this action without the constitutional authority to do so, the Court could, presumably, remedy the depletion of the receivership estate by requiring the CFPB to reimburse the receivership estate for the expenses of wrongfully procuring the appointment of the Temporary Receiver. See Bowersock Mills & Power Co. v Joyce, 101 F.2d 1000, 1002 (8th Cir. 1939) (“[W]here the appointment of the receiver was irregular or inequitable or the court which appointed him was without authority so to do, the party who procured the appointment, and not the receivership fund, is liable for the expenses of the receivership.”).

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receivership estate. That as little as approximately \$50,000 may remain from initial assets of approximately \$468,000 substantially diminishes the potential restitution that those allegedly defrauded by Gordon may eventually recover from the receivership estate should the CFPB ultimately prevail on the merits of its claims. Nevertheless, despite Gordon's protestations to the contrary, the Court concludes, after conducting its own review of the invoices and supporting time records, that all of the fees and expenses sought by the Temporary Receiver and its counsel are reasonable. Indeed, a significant portion of those fees and expenses were the result of the disarray and shoddy record-keeping the Temporary Receiver discovered when it took over operation of Gordon's businesses. Gordon's erratic and unprofessional conduct, as well as his filing of a frivolous Motion for Leave to File a Complaint in Intervention against the Temporary Receiver, also forced the Temporary Receiver to incur expenses it would not have otherwise been forced to expend.

For all of the foregoing reasons, the Court concludes that the Temporary Receiver is entitled to the fees, expenses, and relief it seeks. The Court therefore grants the Temporary Receiver's Motion for Fees and Discharge. Specifically, the Court:

1. Adopts the Temporary Receiver's Final Report and Final Accounting (the "financial summary") (collectively the "Final Report"), collectively attached as Exhibit 1 to the Declaration of Kenton Johnson filed in support of the Motion for Fees and Discharge;
2. Approves all receivership administrative expenses, including the Temporary Receiver's fees and expenses and those of its professionals incurred in connection with the receivership proceeding from the inception of the receivership through the wind down and closing of the receivership estate by the Temporary Receiver, as reflected in the Final Accounting attached as Tab 1 to the Final Report, and all of the Temporary Receiver's fees and expenses and those of its attorneys incurred in connection with the administration of the receivership estate and the Temporary Receiver's powers and duties under the TRO and Preliminary Injunction are authorized and to be paid from assets of the receivership estate, including (a) the Temporary Receiver's fees of \$262,450.12 and costs of \$9,959.02, and the Temporary Receiver's attorneys' fees of \$79,624.80 and costs of \$1,035.72 incurred to its counsel, McKenna Long & Aldridge LLP, for the period from the inception of the receivership through and including November 30, 2012, and (b) such additional actual Temporary Receiver's fees and costs and attorneys' fees and costs as are incurred from December 1, 2012 through the date the Temporary Receiver turns over excess funds to the registry of the Court, estimated in the total sum of \$16,466.65 for the Temporary Receiver's fees and expenses, including an estimated \$1,200 for the estimated record disposal expenses to be incurred by the Temporary Receiver pursuant to Sections XII.K. and XII.L. of the Preliminary Injunction set forth in the Final Accounting ("Estimated Records Expenses") and \$19,500.00 for the Temporary Receiver's attorneys' fees and expenses;
3. Approves and confirms all actions and activities taken by or on behalf of the Temporary Receiver and all payments made by the Temporary Receiver in connection with the administration of the receivership estate;

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4. Shall retain jurisdiction of the case in order to address any disputes which may arise concerning the wind down of the receivership estate and the relief provided under this Order;
5. Orders that the Temporary Receiver shall continue its storage of documents and records of the Defendants, including without limitation those of the Receivership Defendants, and shall dispose of, or arrange for the disposal of, records of the Defendants, including without limitation those of the Receivership Defendants, in accordance with the provisions of Sections XII.K. and XII.L., respectively, of the Preliminary Injunction;
6. Orders that the Temporary Receiver shall turn over to the registry of the Court all remaining funds on hand in the receivership estate from the receipts and bank accounts described in the Final Accounting after (a) deducting and paying all administrative expenses incurred through the Final Expense Period and all Temporary Receiver's fees and expenses and attorneys' fees and expenses approved by the Court pursuant to paragraph 2.B. above, and (b) deducting and reserving the amount of the Estimated Records Expenses, with the net sum remaining being the "Excess Funds";
7. Orders that the Temporary Receiver shall, after completion of its duties with respect to the records storage and disposal pursuant to Sections XII.K. and XII.L., turn over to the registry of the Court or as the Court may otherwise direct any sums remaining from the funds retained for Estimated Records Expenses not actually paid for such records storage and disposal;
8. Orders that the Temporary Receiver, its agents, employees, members, officers, independent contractors, attorneys and representatives are discharged and relieved of all duties and responsibilities pertaining to the receivership previously established in this action, except as set forth under Sections XII.K. and XII.L. of the Preliminary Injunction;
9. Orders that the Temporary Receiver, its agents, employees, members, officers, independent contractors, attorneys and representatives are released from all claims and liabilities arising out of and/or pertaining to the receivership and from all claims and liabilities that were asserted and/or could have been asserted in the receivership estate and/or in connection with the Temporary Receiver's administration of the receivership estate, including without limitation (a) all claims for relief and causes of action asserted in or that could have been asserted by any of the defendants, (b) all claims for relief and causes of action asserted in or that could have been asserted in the [Proposed] Complaint in Intervention for Damages, Injunctive and Declaratory Relief attached as Exhibit A to the Notice of Motion and Motion for Leave to File Complaint in Intervention (Doc. No. 54) filed in this case, and (c) all claims for relief and causes of action that could have been asserted against the Temporary Receiver by creditors, consumers, clients and any other persons arising out of the Temporary Receiver's activities in connection with the administration of the receivership estate; and
10. Exonerates the Temporary Receiver's bond.

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IT IS SO ORDERED.