

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Docket No. 219-2014-CV-280

Mark Kane and Monique Kane

v.

Jennifer Dickert; and
Roddi Smith

ORDER FOR APPOINTMENT OF RECEIVER

The plaintiffs are owners of one of four condominium units in the Cushing Street Condominium in Dover, New Hampshire. One of the plaintiffs, Monique Kane, is one of three Condominium Association Board members. The named defendants each own, each with another not named in this litigation, one of the other condominium units. They are the other two Board members.

The plaintiffs ask in their suit that the court enjoin the named defendants from serving on the Board, or that the court modify the condominium documents to eliminate the Board and provide for governance of the Association by all owners and equal voting. The plaintiffs also ask that the court declare all fines imposed by the Board against them void and order the return of any fines they have paid. In addition, the plaintiffs ask for damages for intentional infliction of emotional distress and for an award of attorney's fees.

Although the plaintiffs name two individual Board members as defendants, the plaintiffs request alternative relief which would modify the Condominium's controlling documents to effect a change in the governance of the Association by eliminating the Board of Directors and substituting governance by all owners on an equal voting basis. The plaintiffs also seek to have the court override actions of the Board imposing fines and order the Board to return fines paid. These requests involve not only the ability of the two named defendants to serve on the Board, but also decisions the Board has made as a Board and the fundamental structure of Association governance. Accordingly, the Association's governing body, the Board of Directors, has a right to appear and be heard. The Board has appeared in the proceedings in this case through its counsel, and has intervenor status in this litigation.

The Board has filed a Motion to Appoint Receiver. The two named defendants have filed a Proposed Order on Motion to Appoint a Receiver. The plaintiffs have filed a Response to Motion to Appoint Receiver and a proposed Order on Motion to Appoint Receiver. Hearing was held on October 16, 2014 (*see also* record of hearing held September 26, 2014). The court determines and orders as follows.

The parties do not appear to dispute the authority of this court to order the appointment of a receiver for a condominium association. In any event, the court determines that it has such authority.

It has long been held in New Hampshire that courts have the equitable authority to appoint receivers. *See e.g. Eastman v. Savings Bank*, 58 N.H. 421, 422 (1878) (“We have held that the court have jurisdiction for the purpose of appointing a receiver; and it is an established doctrine of equity, that where a party is rightfully in court, for some purposes, the court will go on and give the proper relief, without subjecting him to the expense and inconvenience of a double suit at law. The jurisdiction, having once rightfully attached, will be made effectual for the purposes of complete relief.”) (citation omitted). That common law doctrine remains today. *See e.g. In re O’Neil*, 159 N.H. 615, 624 (2010) (“the power to appoint a receiver is equitable,” citing *Eastman*).

Although the court is not aware of any published decision in New Hampshire applying the common law equitable appointment principle to condominium associations, there is no reason the long-standing common law principles underlying the equitable doctrine do not apply to the modern creation of condominium associations. *See Granada Lakes Villas Condo. Ass’n v. Metro-Dade Invs. Co.*, 125 So. 3d 756, 760 (Fla. 2013) (“a court’s inherent equitable power to appoint a receiver over a non-profit condominium association” is not limited by statutes authorizing the appointment of receivers in other contexts).

At hearing, although they assert in the alternative that the court should appoint a receiver, the named defendants first assert that the court should dismiss the plaintiffs’ case as filed without the Board approval required by the Condominium documents and as filed in violation of the settlement agreement adopted in prior litigation. The named defendants’ motion to dismiss is denied, without prejudice to their right to raise the issues separately by

pleading in this or in the prior litigation should they wish. Instead, the parties are brought before the court in part in equity, and equity requires that the court act, *see e.g. Eastman*, 58 N.H. at 422, here by ordering the appointment of a receiver.

The Board's Motion to Appoint Receiver makes many allegations concerning two of the unit owners in this four unit condominium, the Kanes (the plaintiffs) and the Greenwoods (mother and son, not parties in this litigation). The court need not, so does not, take up or decide any of those allegations, as resolution of those allegations is not necessary to determine that a receiver is necessary to preserve the Association and thus to preserve the condominium as an asset held by the unit owners. Instead, the court focuses on only three issues: legal expenses arising out of litigation, the related issue of insurance cost and availability, and the capital reserve fund.

Including this case, the Board is presently litigating three active cases involving unit owners. As a result of the litigation, and the contentious relationship of unit owners underlying the litigation, the Board consults its attorney on numerous routine matters. Legal expenses to engage in that kind of litigation and representation is unsustainable by such a small, four unit, condominium association. That the Board continues to incur unsustainable legal expenses as a result of ongoing contentious litigation warrants the appointment of a receiver to reduce or avoid those expenses.

The Board is concerned about the cost and availability of insurance. In this litigation, two Board members have been sued for damages for intentional infliction of emotional distress, and the Board is concerned that it may face a countersuit for damages in a fine collection matter concerning the unit owners not directly involved in this case. That ongoing and contentious litigation between unit owners and the Board may increase insurance costs to a level unsustainable by such a small condominium association or, more serious, may render the Association uninsurable, warrants appointment of a receiver to avoid the risk to the Association and its members.

Although each party – the plaintiffs, the named defendants, and the Board – assert different causes, they all acknowledge that the Association's capital reserve fund – maintenance of which is one of the fundamental obligations of a condominium association –

is inadequate. Even capital work which must and could be done, such as repair of the front steps, is not being done due to the contentious relationship between Board members and unit owners. Addressing and avoiding accelerated depreciation of the condominium, and of the value of the asset held by the unit owners, now and in the future, warrants appointment of a receiver.

The parties dispute the nature and extent of the duties of a receiver. *Compare* paragraph 167 of the Board's Motion to Appoint Receiver *with* the named Defendants' Proposed Order on Motion to Appoint Receiver *and with* the plaintiffs' propose Order on Motion to Appoint Receiver. The Board contemplates a receiver having the broadest possible authority, including the authority to amend the Declaration and Bylaws as the receiver sees fit, and the authority to revisit past Board decisions such as the imposition of fines, and contemplates the receiver remaining in place at least three years. The plaintiffs contemplate a receiver exercising the powers of the Board but not revisiting past violations, and contemplate the receiver remaining in place for six months. The named defendants contemplate the receiver having a limited role in advising the Board going forward but having unilateral authority to review past Board decisions and determine whether they were appropriate, and contemplate the receiver remaining in place until this litigation is resolved.

The court determines that to be effective, the receiver must have all of the powers and duties of the Board, although not the authority to modify condominium documents unilaterally. As the Board could revisit its past decisions, so may the receiver. And although the parties are free to reach agreement that the receiver's services are no longer necessary, the court will ultimately, with or without such an agreement, make that determination.

The parties also dispute who should pay for a receiver. The court determines that it is protection of the interests of all unit owners, a duty of the Association, which requires the appointment of a receiver. Accordingly, although without prejudice to seeking review of the allocation in the future, the cost of the receiver will at least initially be a cost borne by the Association.

The parties agree that a receiver should have substantial experience with New Hampshire condominium law – the court concurs – but have not had the opportunity to

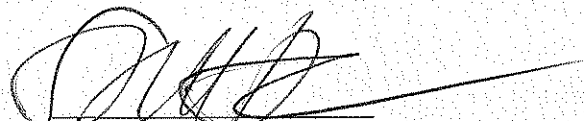
determine whether, through counsel, they can reach agreement as to who the receiver should be. The orders set out below provide the parties with that opportunity, and an alternative means for court selection if the parties are unable to agree.

The court orders as follows:

1. A receiver is to be appointed to assume the duties of the Board of Directors of the Cushing Street Condominium Association.
2. The receiver when appointed will assume all of the duties and authority of the Board of Directors as set out in the Cushing Street Condominium documents.¹
3. The plaintiffs, the named defendants, and the Board shall confer through counsel to determine if they can reach agreement on who shall serve as receiver. Assuming the agreed-upon receiver is willing to serve, the parties shall file an agreed-upon notice of designation of receiver setting out the receiver's qualifications for the court's review and further order.
4. If the parties are unable to reach agreement on designation of receiver within fourteen (14) days of the Clerk's notice of this order, then within twenty-one (21) days, they may separately file requests for appointment of a willing and able receiver, setting out each proposed receiver's qualifications to serve, for the court's review and further order.
5. Fees and expenses of the receiver shall, at least initially, be borne by the Association.
6. The receiver shall file a report, including a report of the receiver's fees and expenses, with the court at least every three months until further order.

So ordered.

October 30, 2014


Steven M. Houran
Presiding Justice

¹ Consequently, the court's provisional order dated September 26, 2014 effectively enjoining certain Board action on a temporary basis will be vacated effective upon appointment of a receiver.