

Section 3

RECEIVERSHIPS AND RECEIVERS

James J. Cotter III, Esq.
Law Office of James J. Cotter III, Quincy

I. WHAT IS A RECEIVER?

- A. Para judicial officer (*Perez II*) appointed by the court.
- B. Stands in the place of the property owner to the extent court authorizes.
- C. Persons appointed
 - 1. attorneys/property managers/community development corporations;
 - 2. should have knowledge of landlord/tenant law/leases; local real estate market (rents, demand, required levels of buildout); Section 8 and LHA/rent payments; Local ISD/board of health; construction/contracting/bidding; permitting/zoning; and, financing;
 - 3. should be able to work with/coordinate architects/engineers; contractors/trades; inspectors; owners; tenants; and, neighbors/abutters/local community groups.

II. WHAT ARE THE RIGHTS AND RESPONSIBILITIES OF A RECEIVER?

- A. Defined by the order of appointment and G.L. c. 111 sec. 127I
 - 1. make repairs/rehabilitate to comply with Article II of the State Sanitary Code;
 - 2. maintain property “in a safe and healthful condition.” (G.L. c. 111 sec. 127I), as opposed to mere compliance with Article II;
 - 3. manage property, collect rents, evict tenants;
 - 4. apply rents to the “payment of any repairs necessary to bring property into compliance with the sanitary code and to necessary expenses of

operation, maintenance and management of property, including insurance expenses and reasonable fees of the receiver, and then to payment of unpaid taxes, assessments...and any excess shall be paid to mortgagees or lien holders. (G.L. c. 111 sec. 127I);

5. borrow funds and grant security interests or liens on property; and,
6. make such contracts as the receiver deems necessary.

B. Expanded, limited or modified by court orders

1. supplementary and implementing orders: and,
2. equity power of court

C. Common law duties

1. represents court and all the parties with an interest in the receivership;
2. must act impartially; and,
3. may not deal with the property for own benefit or advantage, must avoid conflicts of interest and may not derive personal profit other than reasonable compensation.

D. Liability/bond

1. liable for “injuries to persons and property to the same extent as the owner would have been liable; however, such liability shall be limited to the assets and income of the receivership, including any proceeds of insurance purchased by the receiver....” (G.L. c. 111 sec. 127I); and,
2. bond usually waived as additional cost.

E. Accountings

1. must file for court approval accounting of income and expenditures on a bimonthly basis (G.L. c. 111 sec. 127I); and,
2. advisable to file more frequently if more than normal financial activity.

III. WHAT DOES A RECEIVER DO?

A. Preliminary issues

1. determines parties in interest; correct owner(s) of record; absentee/ deceased/infirm owners; need for GAL, mortgagees and lienholders; manner in which to address tenants in common/joint tenants/nominee trusts (beneficiaries)/limited liability company/corporation; and notifies all while determining service of process/alternatives---G. L. c. 223A sec. 3, 4, 6/ Mass. R. Civ. P. (4e)/ publication
2. records notice of lien and any preliminary injunctions (prohibition against sale, refinance and rent collection);
3. determines if clear title required and, if so, clears;
4. determines existence of insurance and, if none, obtain if funds available; and,
5. determines need for emergency repairs and how to finance.

B. Project Assessment/Feasibility/Scope

1. determines scope of work with architect/engineer/contractor---gut rehab/substantial rehab/repairs/emergency repairs;
2. determines approximate cost/estimate with contractors/architects;
3. determines level of plans required full plans and specifications/ specifications only/work list use architect for all except ordinary repairs; use engineer for structural issues; use civil engineer for boundary issues use contractors for repairs; and,
4. determines cost/benefit and return on investment function of cost and market.

C. Determines financing sources and whether work can be financed

1. mortgagees
 - Ñ mortgagees in possession/not on possession/servicing agents
 - Ñ locate/negotiation/stress priority of receiver's lien;

2. owner's resources

Ñ assets---liquid and non-liquid (asset search)

Ñ other properties owned---use positive cash flow/equity -add properties to receivership for limited purpose of using net income

Ñ obtain direct payments from Section 8 contracts (LHA);

Ñ sell owners' properties to generate funds;

3. lenders

Ñ conventional

Ñ stress priority of receiver's lien/CRA requirements

Ñ subprime/non-conventional (18%+ up to sale/auction value of property);

4. public/private organizations

Ñ Life Insurance Community Reinvestment Initiative (617 536-2850)

Ñ Property and Casualty Insurance Initiative (617 723-7878 *pcifund.com*)

Ñ CDC's

Ñ Non-profit groups

Ñ Community Reinvestment Act requirements

Ñ Municipalities

Ñ CDBG funds/UDAG

stress priority of receiver's lien/cost benefit/ability to pay back by lien foreclosure; and,

5. obtain court approval of loan agreement and related documents.

D. If no financing, advises court and determines options

1. revise scope of work;

2. secure property and wait/manage; and,
3. if nuisance, obtain order for owner to abate or authorize receiver to sell (*Pendoley v. Ferreira*, 345 Mass. 309, 314-315 (1963)) and, if sale, Court retains, through surviving provision in P&S, jurisdiction until property rehabilitated.

E. Selects contractor

1. check references, check for construction supervisor license and complaints with Commonwealth of Massachusetts;
2. view similar projects;
3. use references from architect/professionals/word of mouth;
4. prepare bid package
 - Ñ plans/specifications
 - Ñ special conditions (completion date, penalties, insurance, retainage);
5. determine lowest most qualified, credible bid; and,
6. obtain court approval/monitoring of contract.

F. Prepares contractor's contract

1. determine legal entity;
2. obtain personal guaranty;
3. define Scope of Work/AIA Form
 - Ñ Attach and incorporate all plans/specs and bid
 - Ñ "Work to be performed on diligent and continuous basis without interruption to completion in accordance with all applicable state and local laws, rules and regulations."
 - Ñ "All work necessary and required by law for the issuance of a CO for" the property"

Ñ insurance---contractor's general liability insurance, property damage and personal injury; workman's compensation

Ñ insureds are owner and receiver

Ñ warranty---one year for workmanship and materials and get manufacturers' warranties;

4. set completion date penalty for late completion and no incentive payment for early completion;
5. provide for retainage, retainage, retainage---at least 10% of advances for punch list or if completion of work by others required; and,
6. monitor contractor by receiver/city/court

IV. WHAT ARE THE RIGHTS OF TENANTS DURING RECEIVERSHIPS?

- A. Cooperative tenants versus uncooperative tenants and the effect on the Receivership.
- B. Conflict between sec.127I role of receiver and tenants' statutory rights re
 1. payment/withholding of rent;
 2. code enforcement by tenant by separate complaint/right to repair and deduct;
 3. management; and,
 4. court orders.
- C. The implications of *Reeder* and *Perez* cases.
- D. Statutory versus constitutional receiverships
 1. "In constitutionally based receivership, administrative rules and statutory provisions inconsistent with the fulfilment of constitutional mandates appropriately may be modified or set aside by court order." *Spence v. Reeder*, 382 Mass. 398 (1981);

2. receivership pursuant to G.L. c. 111 sec. 127I ordered solely to achieve statutory goals, *Id.*; and,
3. delaying exercise of rights versus modifying or setting aside.

V. WHAT IS THE ROLE OF THE COURT?

- A. Reviews/approves scope of work, contracts/agreements/periodic accountings/time lines/budgets.
- B. Schedules status conferences and insures access/contact with receiver.
- C. Provides conflict resolution, direction for receiver.
- D. Issues implementing, supplementary, directive and clarifying orders.
- E. Approves extraordinary or substantial expenses before incurred.
- F. Determines complaints for contempt.

RECEIVERSHIP STATUTES

G.L. c. 111 sec. 127I

RECEIVERSHIP CASES

Ex Parte Perterson, 253 U.S. 300, 312 (1920) (courts have, in the absence of legislation to the contrary, inherent power to provide themselves with appropriate instruments required for the performance of their duties)

Judge Rotenberg Educ. Ctr. Inc. v. Commissioner of Mental Retardation, 422 Mass. 430, 463,466 (1997) (The equitable jurisdiction of the Court provides “broad and flexible powers to fashion remedies. The “law leaves to the sound discretion of the trial judge the issuance and scope of equitable relief.”)

Lopez v. Medford Community Center, Inc. 384 Mass. 163,169 (1981)

Spence v. Reeder, 382 Mass. 398, 414-415 (1981) (Once a court has taken the extraordinary step of crediting a receivership to pursue a statutory objective... that court surely must have and must utilize a continuing authority to issue supplementary orders designed to assist in various detailed aspects of the operation of the receivership. The bold step of creating a receivership in the compelling circumstances fully set forth in our opinion in *Perez II* cannot be followed by a timid view of what the court may do in an attempt to make the receivership successful. Judicial authority to enter implementing orders is inherent in the equity power of the courts.)

Perez v. Boston Housing Authority, 379 Mass. 703 (1980) (While the receivership statute is naturally geared to the prospect of single properties in violation of the sanitary code, the statute can be read to “empower the court on compelling facts to install a receivership of broader coverage, not limited to a single property or to the rents.” The provision of a receivership statute “draws with it a power in the court to call to its assistance any agents or officers-we may call then parajudicial officers-whose services appear to be reasonably necessary to attain a legitimate objective. Indeed, the power may be said to inhere in a court whether sitting on the “law” or “equity” side....”)

Nuisance

G.L. c. 111 sec. 122-125A authority of board of health to declare a nuisance, order it remedied and remedy if the owner fails.

Pendoley v. Ferreira, 345 Mass. 309, 314, 315 (1963) (Plaintiffs were entitled to have the operation of the nuisance “terminated within a reasonable time” and court granted owner a reasonable opportunity to liquidate the nuisance by sale.)

RECEIVERSHIP FORMS

I. NATURE OF RECEIVERSHIP

A. Petition

1. Petition of the City of Boston ...To Enforce the State Sanitary Code ... and For Appointment of Receiver

B. Orders

1. Receiver's Motion to Extend Receivership
2. Order permitting collection of rent from other properties and to grant mortgagees
3. Receiver's Motion to Pay Sale Proceeds to Receiver
4. Receiver's Motion to Order Filing of Financial Statement
5. Receiver's Motion for Preliminary Injunction

III. PRELIMINARY ISSUES

A. Parties in Interest

1. Receiver's Motion to Add Party Defendant
2. Receiver's Motion to Join Party Defendant
3. Receiver's Motion For Service By Publication
4. Order on Receiver's Substitute Motion For Service by Publication
5. Receiver's Motion To Add Parties Defendant (mortgagees)
6. Affidavit of Service re service by publication on out of country defendant
7. Affidavit of Service re absent defendant

8. Receiver's Request for Default

B. Recording Preliminary Orders

1. Notice of Appointment of Receiver and Receiver's lien pursuant to G.L. c. 111 sec. 127I
2. Receiver's Motion To Enjoin Conveyance of Title
3. Receiver's Motion to Enjoin Sale of Property By Defendant
4. Receiver's Motion For Order Enjoining Continuation Of Nuisance
5. Order re continuation of nuisance

C. Mortgagees

1. Complaint Relating to Joined Defendants [mortgagees] (see III. 4)
2. Final judgment and Order re sale of property free and clear of mortgage

D. Clear Title

1. Receiver's Motion For Order Relating to Dissolution Of Lis Pendens

IV. PROJECT FEASIBILITY

A. Sale of Property

1. Rider to Purchase and Sale Agreement re continuation of receivership
2. Final judgment and Order re sale of Property with service on defendants pursuant to G.L. c. 144 sec. 95-95B and recording pursuant to G.L. c. 183 sec. 143
3. Final judgment and Order re sale of Property free and clear of mortgage (No. 21)

V. FINANCING SOURCES

A. Owner's Resources

1. Motion To Add Properties to Receivership (No. 2)
2. Receiver's Motion to Pay Sale Proceeds to Receiver See I. F. (No. 4)
3. Order Permitting Collection of Rent from other Properties and to grant mortgages See I. F. (No. 3)

B. Lenders

1. Receiver's Motion to Enter Into Construction Loan and Related Agreements and to Sell Property
2. Order re Motion to Enter Into Construction Loan and Related Contracts And For Authorization to Sell Property

VII. CONTRACTOR'S CONTRACT

A. Scope of Work/AIA Form

1. AIA Form Agreement Between Owner and Contractor

IX. ROLE OF COURT

A. Court Involvement

1. Receiver's Complaint for Contempt