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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARDEN GROVE GALLERIA, LLC,

Plaintiff and Cross-defendant,

v.

CATHAY BANK,

Defendant, Cross-complainant and  
Appellant;

EMLLEN W. HOAG FOUNDATION,

Objector and Appellant;

DOUGLAS P. WILSON, as Receiver etc.,

Respondent.

G046997

(Super. Ct. No. 30-2010-00342212)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Gail Andrea Andler, Judge. Motion for judicial notice, to take evidence, and make factual determinations. Motion denied. Order affirmed.

Frاندzel Robins Bloom & Csato, Thomas M. Robins III, Michael G. Fletcher and Bruce D. Poltrook for Defendant, Cross-complainant and Appellant Cathay Bank.

Allen Matkins Leck Gamble Mallory & Natsis, Thomas E. Gibbs and Brian R. Bauer for Appellant Emlen W. Hoag Foundation.

Douglas P. Wilson, in pro. per., for Respondent.

No appearance for Plaintiff and Cross-defendant.

\* \* \*

This case involves an appeal and cross-appeal from an order approving a receiver's final accounting, assigning payment of the receivership's expenses, and discharging the receiver. Appellant Cathay Bank (Cathay) has also filed a motion for judicial notice, to take evidence, and to make factual determinations that is opposed by cross-appellant Emlen W. Hoag Foundation (Hoag). The parties' briefs raise multiple issues. But due to events during the pendency of this appeal, the only issues that need to be decided are whether the trial court abused its discretion by imposing the receiver's fees and expenses on Cathay alone and whether it erred in failing to find the receivership estate assumed all of the lessee's obligations for the underlying ground lease. We deny Cathay's motion and affirm the trial court's receivership order.

## FACTS AND PROCEDURAL BACKGROUND

Hoag is the owner of two contiguous parcels in Garden Grove, California. In 2004, it leased the parcels to Garden Grove Galleria (GGG) for a 70-year term. Cathay and GGG subsequently entered into a \$42.5 million construction loan agreement

to build a mixed-use development on the premises covered by the ground lease. The loan was secured by a construction deed of trust recorded against GGG's leasehold interest. Hoag, GGG, and Cathay also signed and recorded a ground lease consent agreement.

In February 2010, GGG filed this action against Cathay seeking damages, specific performance of the construction loan, and other relief. GGG alleged Cathay had stopped paying invoices for construction expenses on the partially completed project. Cathay answered the complaint and filed a cross-complaint against GGG and its principals. Cathay alleged GGG defaulted on the construction loan by failing to timely complete the development, not paying mechanic's liens, defaulting on ground lease payments, and failing to make a payment due on the construction loan's maturity date.

Cathay also filed an ex parte application for the appointment of a receiver, arguing that because of GGG's "multiple continuing [e]vents of [d]efault," its "collateral . . . will be in danger as it sits in an unfinished state . . . ." The court granted the application on April 6, appointing Douglas P. Wilson as receiver. Among other things, the order directed Wilson to "take possession" of the premises, "preserve and protect . . . its improvements . . . to complete the construction," "perform all acts . . . necessary and incidental to preserving, protecting, managing, developing" the premises, including "borrow[ing] additional amounts from Cathay Bank . . . necessary to preserve and complete the improvements . . . ." The order stayed the commencement or prosecution of "any suit or proceeding against GGG" by, among others, the "lessors."

Upon taking possession of the property, Wilson contracted with a security service firm to guard the premises. He paid rent to Hoag as required under the ground lease for the months of April and May. During the pendency of the receivership Wilson also extended the building permit, coordinated the preparation of and oversaw installation of a storm water pollution protection plan, consulted with the development's engineer

and contractor on what was needed to secure partially built structures on the property, challenged tax assessments and a sanitation district sewer user fee, and paid taxes.

In May, Hoag filed a separate unlawful detainer action against GGG. (*Emlen W. Hoag Foundation v. Garden Grove Galleria, LLC* (Super. Ct. Orange County, 2010, No. 30-2010-00376150).) GGG failed to answer the complaint and Hoag obtained a default judgment awarding it possession of the ground lease premises. Hoag evicted Wilson from the property on June 29 and took over the responsibility of paying the security company guarding it.

In August, Wilson filed an ex parte application to hold Hoag in contempt for his eviction. By court order Wilson recovered possession of the premises on October 4. Thereafter, Wilson continued to tender rent payments to Hoag under the terms of the ground lease. Hoag rejected them asserting the ground lease had been terminated. Two months later, GGG successfully moved to set aside the unlawful detainer default judgment. Wilson and Hoag later executed a stipulation terminating the contempt proceeding.

In February 2011, Cathay filed a motion to terminate the receivership. Citing “changed circumstances and no income to support the receivership,” it argued “the receivership is no longer necessary nor viable, in that there have been no real buyers, entities nor persons that have come forward to complete construction” of the project. GGG and Hoag opposed the motion. GGG argued the “receivership was never for an income producing property” and “[t]he only ‘change’ that has occurred is Cathay Bank’s willingness to pay for the costs of the receivership.” (Emphasis omitted.)

Hoag complained the actions of both Cathay and Wilson in opposing its termination of the ground lease “have prevented [it] from obtaining [the] clear title needed to attract a replacement developer, and left [Hoag] facing loss of [the p]roperty to foreclosure by the mechanic lien claimants.” In addition, contrary to its prior position, it

urged the court not to terminate the receivership until Wilson “complied with his duties under the receivership order and California law” by performing “all executory obligations under the [g]round [l]ease,” including paying the “rental obligations,” “outstanding property taxes,” and “remov[ing] numerous liens and encumbrances that have been recorded since he took possession.”

Wilson took no position on Cathay’s request, however he noted he had taken possession of “a construction project . . . commenced, but not completed,” that “generates no cash flow.” Further, he objected to Hoag’s claim for unpaid rent, declaring “[t]he ground lease has been neither assumed nor rejected . . . .” While acknowledging he owed rent to Hoag during the period of his occupancy, and had attempted to pay the rent specified in the ground lease, Wilson noted it “may be based on reasonable rental value rather than the contract rate.”

After several continuances, the court denied Cathay’s motion. In a June minute order, the court explained its ruling was “without prejudice in that, based on the present showing, there was insufficient support for terminating the receivership at this time.” The court noted the order appointing the receiver, drafted by Cathay, gave “the [r]eceiver broad powers,” including the authority to borrow money to complete construction of the project and to settle claims encumbering the property, and Cathay “clearly knew that the project was not generating any income, nor was it likely to do so without further funding by the Bank or another lender.” Consequently, “[c]ontrary to the assertions of [Cathay], . . . the purpose of the receivership as set forth in the application . . . has not been completed.”

Wilson then filed a motion to compel Cathay and GGG to fund the receivership’s expenses and to set a date for him to adopt or reject the ground lease. Cathay and Hoag opposed the motion. In its opposition, Cathay argued “the reasonable rental value [of the premises] is measured by reference to the current rental market”

which it claimed “has been zero since the appointment of the receiver.” Hoag argued Wilson had already assumed the ground lease. `

The court initially took the motion under submission. At an August status conference, all parties but GGG agreed to terminate the receivership effective September 16 and turn over possession to GGG. As a result, the parties agreed to further defer a ruling on Wilson’s motion until the final accounting.

Wilson filed his motion for discharge and approval of final accounting. Again, Cathay and Hoag opposed it. Cathay repeated its claim the property’s fair rental value was zero, while Hoag continued to argue “the Receiver’s obligation to pay ground rent under the Lease is clear and unequivocal.”

The trial court issued a minute order approving Wilson’s final accounting, discharging him, and exonerating his surety bond. It directed Cathay to pay the receivership’s expenses, which included: (1) \$347,395 to Hoag for the rent due under the ground lease during the period of the receivership; (2) \$500,349 to Atlas Construction Supply, Inc. for the cost of scaffolding left on the premises during the receivership, plus interest; and (3) \$459,462 to the receiver to cover his fees (\$69,664), attorney fees (\$140,956), property taxes owed to the county (\$249,903), the fees of tax consultants (\$3,462), and storage costs (\$27,750).

In concluding the rent due to Hoag should be based on the ground lease, the court found “the Receiver affirmed the lease[] and was therefore bound to pay pursuant to the lease terms.” The court also explained why it ordered Cathay to pay the receivership’s expenses: “The Bank benefitted from the Receivership in that the Bank vigorously sought the Receivership, and the Receivership preserved the Bank’s collateral, i.e., the ground lease, so that the Bank could get a substitute developer to complete the project. The Bank opposed the attempts of [Hoag] to regain control over its property. The Bank knew that there were no funds to pay for the Receivership in that it stopped

funding [GGG] . . . . The Bank knew that [GGG] relied on the Bank[’s] funds to fulfill [GGG’s] lease obligations to [Hoag] during the construction period. The Bank knew that during the construction, the project was not generating any income.”

The court directed Hoag to prepare a formal order. Hoag’s initial draft contained the following paragraph: “By virtue of the Receiver’s affirmation of the Ground Lease and the termination of the receivership and discharge of the Receiver, [Hoag] is entitled to recover from the receivership estate damages for termination of the Ground Lease under California Civil Code section 1951.2 [specifying the damages available to a landlord upon the tenant’s abandonment of a lease before the end of its term]. The award of any such damages shall be a receivership expense for which Cathay . . . shall be obligated to pay. The [c]ourt will set a discovery schedule and trial date for determination of those damages.”

Wilson successfully opposed the inclusion of this paragraph in the formal order. He noted “[t]he [c]ourt found that the Receiver affirmed the leases, and based on that finding awarded” to Hoag the rent due under the ground lease for the time the receivership possessed the property “not just ‘reasonable rental value’” and “did not award [Hoag] a claim for damages for future periods.” The court agreed with Wilson and struck both the challenged paragraph and another reference to it, declaring “[t]he issue of whether there was a breach of the lease agreement before the receivership and the amount of any damages for unpaid rent before or after the receivership period is to be determined in the underlying action(s).”

Thereafter, the court signed a formal order that declared Cathay was “obligated to pay [the] receivership expenses” described above and “[t]he Receiver affirmed the Ground Lease and the Ground Lease is a liability of the receivership estate.” These appeals followed.

## DISCUSSION

### *1. Introduction*

Cathay's opening brief asserts the trial court erred in finding: (1) Wilson affirmed the ground lease to the extent this finding supports a conclusion Cathay is liable for the lease's obligations before or after the receivership's possession of the premises; (2) Cathay is liable for all of the receivership's expenses; and (3) the amount awarded to Atlas Construction Supply, Inc. constituted a proper receivership expense. Hoag's opening brief argues the trial court's order meant Wilson effectively assumed all of the obligations of the ground lease. Thus, the court erred in failing to also find Wilson's request to terminate the receivership constituted a repudiation of the ground lease, entitling it to damages against the receivership estate for breach of the lease, including the unpaid mechanic's liens and lost future rent.

While the appeals were pending, Cathay settled with Atlas and dismissed it as a party. Cathay's reply brief acknowledges its appeal from that part of the trial court's discharge order is now moot. In its opening brief, Cathay also acknowledges it owes the sums awarded to Hoag for rent and to the county for taxes. Further, Cathay has filed a motion asking that we take judicial notice of a September 2012 reinstatement and cure agreement signed by it and Hoag. The motion also requests we take evidence and make findings on its compliance with the terms of the reinstatement agreement, arguing that if the motion is granted, Hoag's appeal is largely moot. Hoag opposes this motion.

As discussed below, we deny Cathay's motion. This appeal is limited to two issues. First, whether the trial court abused its discretion in declaring Cathay liable for the receiver's fees and expenses. Second, whether the trial court erred in failing to make a finding the receivership estate (and hence Cathay) is responsible for additional damages under the lease.

## 2. *Cathay's Obligation to Pay the Receivership's Expenses*

Cathay argues “there is no requirement that the party who obtains a receiver is invariably liable for 100% of the expenses,” and thus “special circumstances must be present in order to charge [it] with the receivership expenses . . . .” Cathay further claims “the equities” of the case support requiring Hoag and GGG contribute to the payment of the receiver’s fees and expenses. Both Wilson and Hoag dispute these arguments and urge we uphold the trial court’s ruling.

We conclude the trial court did not err by directing Cathay to pay all of the receiver’s fees and expenses. “Receivers are entitled to compensation for their own services and the services performed by their attorneys. . . . Courts are vested with broad discretion in determining who is to pay the expenses of a receivership, and the court’s determination must be upheld in the absence of a clear showing of an abuse of discretion. [Citations.]” (*City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, 685-686.)

“Generally, the costs of a receivership are paid from the property in the receivership estate. [Citations.]” (*City of Chula Vista v. Gutierrez, supra*, 207 Cal.App.4th at pp. 685-686; see also *Andrade v. Andrade* (1932) 216 Cal. 108, 110.) But in this case the property’s improvements were only partially built and, without completion of the project, the property could not produce the income necessary to cover the receivership’s expenses.

“[A]n . . . insufficiency of the property” to cover costs is one circumstance allowing a court to impose liability for the receiver’s expenses on one or more of the parties. (*Andrade v. Andrade, supra*, 216 Cal. at p. 110; see also *City of Chula Vista v. Gutierrez, supra*, 207 Cal.App.4th at p. 686.) Thus, where “the fund be insufficient, [the receiver] may then look to the parties at whose instance he was appointed. It may also transpire that liability to pay the expenses and fees of a receivership rests upon any or all of the parties for whose benefit the receivership was created. [Citation.]” (*Stanton v.*

*Pratt* (1941) 18 Cal.2d 599, 603; see also *City of Chula Vista v. Gutierrez*, *supra*, 207 Cal.App.4th at p. 686 [“a relevant factor is whether the party to be charged obtained a benefit from the receiver’s services”].)

The factors cited above support the trial court’s decision to declare Cathay solely responsible for Wilson’s fees and expenses. Cathay successfully sought his appointment, doing so to protect the collateral for its construction loan. As the trial court noted, this gave Cathay an opportunity to “obtain a substitute developer to complete the Project.” Cathay knew the partially completed development “was not generating any income” and that “GGG relied on Cathay Bank’s funds to fulfill [the] Ground Lease obligations during the construction period.” In addition, the court found Cathay successfully opposed Hoag’s “attempt[] . . . to regain control over the . . . [p]roperty” through the unlawful detainer action.

Further Cathay’s claim there must be a showing of “special circumstances” to justify charging it with all of the receiver’s fees and costs is not supported by the cited authority. In *Atlantic Trust Company v. Chapman* (1908) 208 U.S. 360 [28 S.Ct. 406, 52 L.Ed. 528], the Supreme Court held “[t]he mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit . . . .” (*Id.* at p. 376.) The court did not impose the expenses on Cathay solely because the receivership lacked income to cover its costs, but also relied on the fact Cathay sought the receivership to protect its collateral, knowing it was the only source of revenue to support the receiver’s maintenance of the premises and preservation of the partially completed improvements. Also contrary to the situation in *Atlantic Trust Company*, when the receivership was terminated the underlying litigation between GGG and Cathay had not yet been resolved.

*Meili v. Crane* (1929) 102 Cal.App. 144 is also not on point because it concerned a party's right to recover compensatory damages from the funds acquired by the receiver from the underlying litigation. There the defendants obtained a loan from the plaintiffs secured by two mortgages; one encumbering a parcel of land and a second on the defendants' furniture, equipment, and leasehold interest in an apartment building. The defendants defaulted on the loan. The plaintiffs sued and obtained a receiver to operate the apartment building. The receiver sold the defendants' furniture for \$1,000. The plaintiffs also foreclosed on the real property, resulting in a surplus of nearly \$4,000. The owners of the apartment building were allowed to intervene in the action and brought an unlawful detainer action resulting in eviction of the receiver and a money judgment exceeding \$4,800. The trial court awarded the \$1,000 obtained from the furniture sale to the interveners, but refused their request to recover the balance owed them from the foreclosure sale proceeds. The Court of Appeal affirmed, finding there was no irregularity in the receiver's appointment and the plaintiffs "ha[d] not benefited beyond their right." (*Id.* at p. 146.) The current case does not involve a division of litigation proceeds in the receiver's possession.

"Each case of this kind must, of necessity, rest upon its own facts." (*Baldwin v. Baldwin* (1947) 82 Cal.App.2d 851, 856.) The question of whether the equities justified imposing the entire responsibility for the receiver's fees and expenses on Cathay, or ordering Hoag or another party to shoulder part of that obligation, was one for the trial court to decide. "Since the matter is clearly one of discretion and no abuse of such discretion appears, there can be no interference by an appellate court." (*Ibid.*)

### 3. *The Scope of the Receiver's Obligations under the Ground Lease*

#### a. *Introduction*

In its formal order, the trial court found "the Receiver tendered rent

payments under the Ground Lease to [Hoag] whereby the Receiver affirmed the Ground Lease.” It thus declared, “[t]he Receiver affirmed the Ground Lease and the Ground Lease is a liability of the receivership estate.” However, the court awarded Hoag rent only for the period of time Wilson occupied the premises.

In its cross-appeal, Hoag argues the trial court erred in failing to find it was also “entitled to recover from the receivership estate . . . breach of lease damages including [the] cost to pay the mechanic liens and lost future rent.” Cathay disagrees to the extent such a finding would render it liable for damages arising before or after the receiver had possession of the property.

In addition, Cathay has filed a motion for judicial notice, to take evidence, and make factual findings. The motion notes that while these appeals were pending, Cathay and Hoag signed a reinstatement and cure agreement providing Cathay had previously paid or agreed to pay Hoag for back rent, property taxes, and its attorney fees, plus promised to provide Hoag with release bonds concerning the recorded mechanic liens and to indemnify Hoag for the liens. Cathay claims that it has satisfied the foregoing obligations and asks this court to take judicial notice of the reinstatement and cure agreement and to find that it has satisfied the foregoing conditions. It thus claims “Hoag’s appeal is moot with respect to the receivership’s/Bank’s liability for mechanics lien claims.”

Hoag filed opposition to the motion. It acknowledges execution of the reinstatement and cure agreement, but argues “the remaining defaults and resulting damages should be left to the trial court on remand,” and “the primary factual determination sought by [Cathay] in its motion – that the mechanic lien defaults have all been cured – is inaccurate.”

We deny Cathay’s motion. The reinstatement and cure agreement was signed after the trial court’s order discharging the receiver. Generally, matters occurring

after the judgment or order from which an appeal has been taken are not reviewable. (9 Witkin, California Procedure (5th ed. 2008) Appeal, § 337, pp. 387-388.) Further, as Hoag's opposition reflects, there are disputes over the dispositive nature of Cathay's motion and whether Cathay has satisfied all of its obligations under the agreement. While we have authority to make factual findings in a case such as this one (Code Civ. Proc., § 909), it is one that should be exercised sparingly where, unlike this case, exceptional circumstances are present. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 13.)

*b. Analysis*

On the merits, we conclude the trial court did not intend to make a finding on the receiver's assumption or rejection of the ground lease. The formal order's unfortunate use of the terms "affirm" and "liability" to describe the receivership's rental obligation was only to support the determination that the rent due would be the rate established by the ground lease.

"It is a general rule that a receiver does not affirm and adopt an existing contract merely by taking possession of the property to which it relates along with other property of the estate . . . . It is not the rule that the contract is binding on the receiver until renounced." (*Pacific Western Oil Co. v. McDuffie* (9th Cir. 1934) 69 F.2d 208, 213; see also *H.D. Roosen Company v. Pacific Radio Publishing Company* (1932) 123 Cal.App. 525, 534 ["The mere fact of possession does not, however, obligate the receiver to carry out executory contracts of the debtor"].)

Courts have recognized a receiver's "[a]doption [of a contract] may be signified either by express agreement or by implication . . . ." (*H.D. Roosen Company v. Pacific Radio Publishing Company, supra*, 123 Cal.App. at p. 534.) Also, in the case of a lease, where "the receiver remains in possession beyond a reasonable time to make the election, he elects to accept the lease by implication, and is bound by its terms."

(*Toushin v. Gonsky* (1979) 77 Ill.App.3d 508, 516 [395 N.E.2d 1124, 1130].) But “[t]he question as to what constitutes a reasonable time is to be determined from all surrounding facts and circumstances.” (*North Kansas City Bridge and R. Co. v. Leness* (8th Cir. 1936) 82 F.2d 9, 13; see also *Athanason v. Hubbard* (Fla.App. 1969) 218 So.2d 475, 477.)

Contrary to Hoag’s claim the term “affirm” is not synonymous with “assume.” Further, from a review of the record and both the trial court’s February 2011 minute order and its formal ruling, the reference to affirming the ground lease was to resolve the dispute over what Wilson owed in rent for his occupancy of the premises. Cathay argued that it was merely the property’s fair rental value in its current partially constructed state. Hoag claimed rent in the amount stipulated in the ground lease. The trial court sided with Hoag by looking at the receiver’s actions in paying or tendering rent in the amount required by GGG’s lease. Proof of the trial court’s intent is also shown by its rejection of Hoag’s attempt to insert a finding in the formal order premised on its assumption theory. The court struck the proposed paragraph, declaring its “finding that the receiver affirmed the lease was intended only to apply to the amount of rent that accrued during the receivership period,” and leaving the issue of “damages for unpaid rent before or after the receivership period . . . to be determined in the underlying action(s).”

We also reject Hoag’s contention the evidence establishes as a matter of law that Wilson assumed the ground lease. It is clear Wilson never formally assumed the ground lease. He repeatedly declared throughout the receivership proceedings that he had not elected to either assume or reject the lease. Likewise, the evidence fails to support Hoag’s argument Wilson nonetheless assumed the lease by implication through his actions and the length of his possession of the property. After taking possession of the premises, Wilson’s efforts were focused on protecting the property, including the

construction work already performed, and preserving the rights essential to allow resumption of the development once the litigation terminated. These action were expressly authorized by the order appointing him as receiver. He took no further action to complete the project.

Hoag's reliance on the decisions in *Toushin v. Gonsky*, *supra*, 395 N.E.2d 1124 and *Crawford v. Gordon* (1915) 88 Wash. 553 [153 P. 363] to support its argument is unavailing. *Toushin* involved a receivership where the receiver took possession of two theaters and operated them for seven months. Wilson merely provided security for the property and preserve the development rights without taking any steps to complete the project and sell or sublease units to others.

In *Crawford*, receivers appointed by a federal judge in a state court action contracted to purchase railroad cars from the appellants. Subsequently, the federal court's receivership order was invalid and a state court appointed other receivers to replace the federal appointees. Nonetheless, the state receivers continued to use the railroad cars. The appellants demanded payment of the balance due for them, but the state court receivers rejected it. The court held the state court receivers were bound by the purchase agreement. "The receivers knew the sale was voidable. They had the property in possession and in use, and it was up to them to repudiate it within a reasonable time or to bring it to the notice of the court. When they . . . continued to use the property without calling for proof beyond the prima facie case made by the appellants, they ratified the contract." (*Crawford v. Gordon*, *supra*, 153 P. at p. 366.) No similar conduct was engaged in by the receiver in this case.

As noted, the question of whether a receiver has assumed an executory contract by remaining in possession of the premises for an unreasonable length of time also presents a factual question. Given the delays resulting from Hoag's unlawful detainer action, the other legal proceedings previously cited, the condition of the property

and its title, and the difficult economic environment, we cannot conclude Wilson maintained possession of the premises for an unreasonable length of time. (See *North Kansas City Bridge and R. Co. v. Leness, supra*, 82 F.2d at p. 12 [finding a receiver's nearly 17-month possession "was not an adoption of the contract"].)

Therefore, we conclude the trial court's ruling that Wilson was obligated to pay rent at the rate contained in the ground lease for the period of time he possessed the premises did not constitute a finding the receiver had assumed the lease. Nor was the evidence such that, as a matter of law, it must be found Wilson assumed the lease.

#### DISPOSITION

The motion for judicial notice, to take evidence, and make factual determinations is denied. The order is affirmed. Respondent Douglas P. Wilson is entitled to his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.