

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

21500 NORTHWESTERN HIGHWAY  
HOLDINGS, LLC,

Plaintiff,

v

Case No. 14-143069-CH  
Hon. Wendy Potts

NORTHLAND CENTER MICHIGAN, LLC,

Defendant.

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OPINION AND ORDER RE: INTERVENOR FOOT LOCKER RETAIL, INC'S MOTION  
FOR RECONSIDERATION

At a session of Court  
Held in Pontiac, Michigan  
On

**MAR 31 2015**

Intervening Party Foot Locker Retail, Inc. moves the Court to reconsider its decision granting the Receiver authority to close Northland Mall. The Court has discretion to grant or deny reconsideration. MCR 2.119(F)(3); *Charbeneau v Wayne County General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Reconsideration is warranted if a party identifies a palpable error by which the Court and the parties have been misled and shows that a different disposition must result from correction of that error. MCR 2.119(F)(3).

Foot Locker asserts that the Court's decision deprived it of due process because Foot Locker did not have notice that the Receiver was planning to close the mall and evict it from the property. Due process provisions of the State and U.S. Constitutions forbid the government from depriving Foot Locker of a property interest without notice of the nature of the proceedings and

an opportunity to be heard. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). However, Foot Locker's claim that it had no notice of the Receiver's intention to close the mall lacks credibility. Foot Locker was aware in September 2014 that the Court appointed a Receiver, and the hearing on the motion seeking to close the mall was heavily publicized by local media. It is indeed difficult to believe that Foot Locker first learned about this when the Receiver served it with a notice to quit, and Foot Locker knew or should have known before the Court issued its decision. Had Foot Locker sought leave to intervene before the February 25<sup>th</sup> hearing on the mall closing, the Court would likely have granted the request and given Foot Locker an opportunity to be heard. Even if the Court were to accept Foot Locker's improbable claim that it lacked notice before the Court's decision, it now is well aware of the mall closing, and the Court allowed it to intervene and assert its position through this motion. Foot Locker fails to demonstrate that it had no notice or opportunity to be heard.

Even if Foot Locker lacked notice of the Receiver's motion, this Court's decision did not deprive Foot Locker of any property interest. The Court merely authorized the Receiver to proceed with closing the mall and evicting the tenants. It is the eviction that would deprive Foot Locker of its possessory interest in the leased space. To the extent that Foot Locker has a basis for challenging its eviction, it has notice of it and will have an opportunity to contest it. Because Foot Locker fails to demonstrate that this Court deprived it of a property interest without due process, the Court will not reverse its decision on that ground.

Foot Locker next advances two constitutional arguments that are wholly without merit. It asserts that the Court's decision to allow the Receiver to close the mall was a taking in violation of Foot Locker's Fifth Amendment rights. An unconstitutional taking occurs where the government takes private property for public use without just compensation. *Penn Central*

*Transportation Co v New York City*, 438 US 104, 123 (1978). Foot Locker cites no authority applying the Takings Clause to a Court's decision to allow a Receiver to evict a tenant. Because Foot Locker fails to explain how the Court or the Receiver took its property for public use, the Takings Clause does not apply. Foot Locker also contends, inexplicably, that the Court's decision was an unconstitutional impairment of its contract rights. However, the Contract Clauses of the U.S. and Michigan constitutions apply to legislative enactments, not a court decision. U.S. Const, Art 1 § 10; Const 1963, Art 1 § 10. Foot Locker fails to demonstrate palpable error on either of these grounds.

In its final arguments, Foot Locker challenges the Receiver and this Court's authority to cancel its lease and evict it from the premises. Foot Locker asserts that the Receiver and the Court had no legal authority to do so. However, the Court's decision to allow the Receiver to cease mall operations was based on equity, not legal principals. The Court has broad equitable power to appoint a Receiver and grant him authority to do what is necessary to preserve the Receivership estate. "One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life." *Spoon-Shacket Co v Oakland Co*, 356 Mich 151, 163; 97 NW2d 25 (1959). The equities strongly favored closing the mall, and Foot Locker presents no new facts or evidence to alter that conclusion.

The Court further notes that the relief Foot Locker demands through this motion is, from a practical perspective, simply unworkable. It asks the Court to order the Receiver to keep the mall open, at enormous cost, for itself and the handful of tenants who oppose the closure. As the Court noted in its bench opinion, the mall has been losing money and incurring unsustainable debt long before the Court appointed the Receiver. It is not a financially viable business and Foot

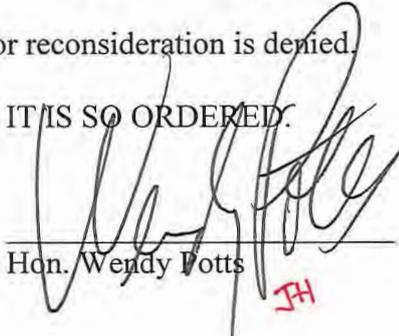
Locker presents no plan that would make the mall a going concern or justify increasing the debt load needed to insure its continued occupancy.

The Court acknowledges Foot Locker's concern about lenders' abuse of receiverships to skirt the foreclosure process. However, this is not a case where a mortgagee sought a receiver without justification for the sole purpose of undermining the owner or tenant's property interests and rights. This mall was in dire financial straits when the Court appointed the Receiver, and its decision to do so was unopposed and well founded on undisputed facts. The Court's recent decision to allow the Receiver to cease operations was not made lightly or based solely on Plaintiff's interests. The Court carefully considered all the circumstances before its decision, including the impact on tenants, and Foot Locker fails to show any error in the facts on which the decision was based. Although closing the mall undoubtedly will cause injury to Foot Locker and other stakeholders, a greater injury would occur if the Receiver was forced to continue mall operations without hope of financial viability.

In sum, Foot Locker had not shown that the Court's decision allowing the Receiver to close the mall was based on palpable error and its motion for reconsideration is denied.

IT IS SO ORDERED.

Dated: **MAR 31 2015**

  
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Hon. Wendy Fotts