

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

ARCTARIS INCOME FUND L.P., and
ARCTARIS CO-INVESTMENT L.P.,

Plaintiffs,

vs.

Case No. 2015-1071-CB

PLASTIC SYSTEMS, LLC, PLASTIC
SYSTEMS HOLDING, LLC, PS KENTON
EQUIPMENT, LLC, KIB HOLDINGS, LLC,
KBUM HOLDINGS, LLC, BIK ROMEO, LLC,
and BIK HOLDINGS, LLC

Defendants,

and

COUNTY OF MACOMB,

Interested Party.

OPINION AND ORDER

Gene R. Kohut, in his capacity as court-appointed receiver ("Receiver"), has filed a motion to terminate receivership, approve final accounting and discharge receiver. TMW Enterprises, Inc. ("TMW") has filed objections to the motion and requests that the motion be denied. Plaintiffs have filed a response to TMW's objections.

I. Factual and Procedural History

On March 31, 2015, Plaintiffs filed their verified complaint for foreclosure and appointment of a receiver. On the same day, Plaintiffs filed their emergency motion for receiver. On April 2, 2015, the Court held a hearing and entered an Order appointing

Gene R. Kohut as the receiver over Defendants' assets ("Receivership Order"). The Defendants remain in receivership and have no ongoing business operations.

On October 21, 2015, the Receiver filed his instant motion to terminate the receivership, approve a final accounting and discharge the receiver. In the motion, the Receiver seeks to, *inter alia*, disburse the remaining \$156,097.02 in the receivership estate to Plaintiffs. TMW, the landlord of the real property on which Defendants have operated, has since filed objections to the motion. Plaintiffs have since filed a response to TMW's objections. On November 30, 2015, the Court held a hearing in connection with the motion and objections and took the matter under advisement.

II. Arguments and Analysis

In its objections, TMW is requesting that the Receiver's motion be denied because it asserts that it holds a claim higher in priority than Plaintiffs' claim. TMW's claim arises out of the leases of two buildings located in El Paso, Texas to Defendant Plastic Systems, LLC ("Plastic Systems"). (See TMW's Exhibit A.) At the time that the Receivership Order was entered, Plastic Systems was a holdover tenant. Since being appointed, the Receiver has paid TMW \$51,313.00 for April 2015 rent and taxes and \$26,466.00 for a part of May 2015 rent and taxes. TMW alleges that there remains an unpaid balance for May rent and taxes of \$26,466.00. In addition, TMW alleges that it is entitled to be reimburse for the costs it incurred in cleaning the leased premises after they were vacated. Specifically, TMW seeks \$58,441.51 in cleanup costs and expenses.

In his motion, the Receiver asserts that the remaining \$156,097.02 should be disbursed to Plaintiff Arctaris Income Fund, L.P. ("Arctaris Income") based on its status as a secured creditor pursuant to its February 27, 2008 financing statement, which was

recorded on June 6, 2012. (See Receiver's Exhibit C.) Moreover, Arctaris Income has paid \$353,204.92 to the receivership estate in order to allow Plastic Systems to wind-up its operations. In exchange for these funds, the Receiver agreed to grant Arctaris Income a first priority claim.

While TMW has cited to authority that supports the position that a lessee has a claim against a receivership estate for damages caused by the receiver's breach of a lease, and that under Texas law a month-to-month tenant is liable for the full month's rent even if they only occupy the leased premises for a portion of the month, TMW has failed to provide any authority that such claims take priority over a secured creditor's claim. Indeed, TMW's position fails to establish that its claim(s) are anything more than that of an ordinary unsecured creditor. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on TMW's failure to support its contention, the Court is convinced that the objection must be overruled.

TMW also contends that Arctaris Income's claim(s) are subject to equitable subordination pursuant to 11 USC 510(c)(1). Specifically, 11 USC 510(c)(1) provides that a court, after notice and a hearing, may subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim. In its objections, TMW contends that Arctaris Income's claim should be subordinated to its claim because Arctaris Income is an insider. In particular, TMW asserts that Plaintiffs directed the affairs of Plastic Systems prior to the receivership. However, TMW has failed to provide any evidence whatsoever in support of its position. As discussed above, the Court will not

search for authority or a basis for a party's blank unsupported assertions. Based on TMW's failure to support its position, the Court will reject its objection.

III. Conclusion

Based upon the reasons set forth above, TMW Enterprise Inc.'s objections to the receiver's motion to terminate the receivership, approve the final accounting and discharge the receiver are **OVERRULED**. Further, the Receiver's motion is **GRANTED**. Specifically, the Receiver's final accounting, as attached as Exhibit E to his motion, is approved, the Receiver shall pay the remaining \$156,097.02 remaining in the receivership estate to Arctaris Income, and after doing so the receivership is terminated. Upon tendering the above-referenced payment, the Receiver is released, discharged and relieved of all of his duties, responsibilities and obligation under the Amended and Restated Third Receivership Order and all bonds will be cancelled.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and **CLOSES** the case.

IT IS SO ORDERED.

Date: JAN 15 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge