

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

RB AFFORDABLE HOUSING, INC. f/k/a)	
ASB AFFORDABLE HOUSING, INC. and)	
REGIONS BANK,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 20-670-BC
)	
GATEWAY EP, LLC, a/k/a or f/k/a)	
GEP, LLC, and EDEN POINTE, L.P.)	
)	
Defendants.)	

ORDER APPOINTING RECEIVER

On June 14, 2021 counsel for the parties appeared before this Court for a telephonic hearing at which the Court heard Plaintiffs' Renewed Motion for Appointment of a Receiver filed June 2, 2021 (the "Receiver Motion"). In the Receiver Motion, Plaintiffs sought the dissolution of Defendant Eden Pointe, L.P. ("Eden Pointe" or the "Partnership") and the appointment of a liquidating trustee and/or receiver. As set forth before, the Court is appointing a Receiver as equitable relief without prejudice to other relief requested.

The Court is of the opinion that a receiver should be appointed:

1. Courts are vested with the power and discretion to appoint receivers for the safekeeping, collection, management and disposition of property in litigation whenever necessary to the ends of substantial justice. Tenn. Code Ann. § 29-1-103. Whether to appoint a receiver and the selection of a receiver are matters within the sound discretion of a Chancellor. *Norris v. Stuart*, 2006 WL 721299 * 4 (Tenn. Ct. App. 2006).

2. In the context of partnerships, the factors supporting the appointment of a receiver are “where there is a serious disagreement among the partners” or “where the partner or partners against whom a receiver is sought have been guilty of a breach of duty, a violation of the partnership agreement, or misconduct or mismanagement by reason of which a waste of assets is threatened.” 68 C.J.S. Partnership § 491.

3. Plaintiffs are limited partners of Eden Pointe. Defendant Gateway EP, LLC (“GEP”) is the general partner pursuant to a partnership agreement, a copy of which is attached to the First Amended Complaint (the “Partnership Agreement”) and the Revised Uniform Partnership Act as adopted in Tennessee (“RULPA”) at T.C.A. § 61-2-101 *et seq.* The Partnership Agreement and RULPA set forth the duties and obligations that GEP, as general partner, owed to Plaintiffs, as limited partners.

4. Plaintiffs filed this lawsuit on July 10, 2020 and sought the dissolution of Eden Pointe and the appointment of a liquidating trustee or receiver, among other relief. According to the original complaint, examples that warranted the relief sought were that GEP, which is also the Tax Matters Partner under the operative Partnership Agreement, had failed to prepare and file tax returns for 2017 through 2019, and GEP had become administratively dissolved. Defendants did not dispute these facts in their answer.

5. Defendants sought to unsuccessfully challenge the venue of this Court because Eden Pointe and Plaintiff Regions Bank are parties to a suit in Shelby County, Tennessee Chancery Court, Case No. CH-14-0019 (the “Shelby County Lawsuit”) which Eden Pointe initially filed to stop a foreclosure sale of real property owned by Eden Pointe (the “Project”).

6. It is undisputed, according to the exhibited order attached to the Notice filed by Plaintiffs with this Court on April 14, 2021, that the Project has been sold, and that in 2017,

\$629,436.95 (the “Shelby County Funds”) was deposited with the Shelby County Chancery Court as part of the Shelby County Lawsuit. Regions Bank asserts that the Shelby County Funds are its collateral, and Eden Pointe claims it is entitled to those funds.

7. On January 12, 2021, Plaintiffs filed a motion for judgment on the pleadings, which was heard on February 12, 2021. As part of that motion, Plaintiffs asserted that Defendants had not disputed that they had not filed the tax returns or reinstated GEP.

8. At the hearing of that motion, counsel for Defendants informed the Court and opposing counsel that Defendants were still working on the tax returns and reinstating GEP, and that they projected it might take some time to accomplish those tasks. The February 12, 2021 Supplemental Response revealed that the tax returns had actually been filed in December 2020.

9. According to Defendants’ notice filings with this Court dated April 8 and April 14, 2021, it appears that Eden Pointe incurred penalties relating to the tax filings.

10. On April 21, 2021, this Court held a case management conference and set a July 30, 2021 fact discovery cut-off date, which was set forth in its order entered that day (the “April 21, 2021 Order”). At the April 21, 2021 hearing, counsel for Plaintiffs explained to the Court and opposing counsel that Plaintiffs intended to seek financial records, including records relating to the tax returns from Defendants and the Partnership’s accounting firm, Mahoney, Ulbrich, Christiansen and Russ. P.A. (referred to as the “Mahoney Firm”), which is based in Minneapolis, Minnesota.

11. Consistent with Plaintiffs’ counsel’s representations on April 21, 2021, Plaintiffs served interrogatories and requests for production of documents on Defendants and had a subpoena for documents issued to the Mahoney Firm in Minnesota.

12. The Mahoney Firm, acting on instructions from Defendants' counsel, refused to respond to the subpoena based on an assertion of an "accountant-client" privilege.

13. Furthermore, as set forth in Plaintiffs' filings, Defendants refused to produce documents in response to written discovery served on them based on various objections, including an accountant-client privilege, attorney-client privilege, and failure to state a claim. Defendants did not produce a privilege log as required by Tenn. R. Civ. P. 26.02(5).

14. Plaintiffs are entitled to access to Eden Pointe's books and records as limited partners of Eden Pointe. See Tenn. Code Ann. § 61-2-304 and Partnership Agreement, Sections 9.7(g) and 9.1. The information and documents Plaintiffs sought in their written discovery requests seek documents that appear to be within the scope of discovery under Tenn. R. Civ. P. 26. Counsel for Plaintiffs has further explained that information regarding tax returns and tax credits is of particular concern to the Plaintiffs because of the pass-through nature of a limited partnership and the tax credits that the Project was intended to generate.

15. Nevertheless, Defendants admittedly produced no documents or privilege logs to Plaintiffs in response to the written discovery requests Plaintiffs served on Defendants other than producing a copy of a record from the Tennessee Secretary of State regarding the reinstatement of GEP, and their objections are not made in good faith.

16. In their response filed June 14, 2021, Defendants argued that Plaintiffs should pursue their remedies by a motion to compel, further evidencing their lack of good faith in connection with discovery and the Defendants' overall refusal to cooperate with Plaintiffs or otherwise comply with their duties and obligations under the Partnership Agreement and RULPA.

17. The Court is of the opinion that the conduct of Defendants justifies the appointment of a receiver. The Court is not ordering the dissolution of Eden Pointe or addressing other claims

in the First Amended Complaint at this time. The Court will consider amending the April 21, 2021 Order once a receiver has been put in place.

18. As set forth below, the Receiver shall be entitled to seek reimbursement from the Shelby County Funds and any other funds it is able to recover on behalf of Eden Pointe.

WHEREFORE, the Court hereby ORDERS:

- A. A receiver is to be appointed in this case with respect to Eden Pointe. The Court hereby appoints Robert J. Mendes to serve as the receiver (“Receiver”), who has agreed to serve as Receiver. No bond is required under Tenn. Code Ann. § 29-1-104 so long as the Shelby County Funds remain in the custody of the Chancery Court for Shelby County or are otherwise distributed by order of either this Court or the Chancery Court for Shelby County.
- B. The Receiver shall have the following rights and powers as may be exercised in the Receiver’s reasonable discretion without further Court order or approval, unless otherwise restricted herein:
 1. To marshal, take possession of, and administer the assets and books and records of Eden Pointe (the “Assets”), wherever located, and to protect and preserve the Assets;
 2. To negotiate, enter into, modify, ratify, reaffirm, enforce, settle or terminate any agreement, contract, or arrangement pertaining to the Partnership or the Assets, or any portion thereof, including any contract, agreement, or arrangement in existence when the Receiver takes possession of any Assets;
 3. To investigate, file, prosecute, defend, and/or settle any claims or legal proceedings relating to the Assets or to the Partnership;

4. To employ any person or firm, including current or former employees of Eden Pointe, to collect, manage, lease, list, market, sell, or maintain the Assets or to wind up the business of the Partnership;

5. Subject to the provisions of Section G below, to hire, employ, and retain attorneys, certified public accountants, investigators, security guards, consultants, brokers, and other personnel or employees that the Receiver deems necessary to assist in the performance of the Receiver's duties;

6. To investigate the tax returns filed by and/or on behalf of Eden Pointe, prepare and file restated tax return(s) or related filings with any governmental entities if appropriate, and take such additional action to ensure proper past and future compliance with tax laws and related requirements, including low income housing tax credits allocated to and/or arising from the Project;

7. To obtain from third parties Eden Pointe's past and current records, including, without limitation, accounting records, banking records, and any other books or documents necessary to perform the duties of the Receiver;

8. If the Assets available to the Receiver are insufficient to pay the ordinary, necessary, and reasonable costs and expenses of the Receiver, the Receiver shall have the power to borrow funds from Plaintiffs. Plaintiffs may, but are not obligated to, advance to the Receiver sufficient funds to pay such ordinary, necessary, and reasonable costs and expenses (hereinafter the "Receiver Advances").

9. To open and use bank accounts for any Receiver funds;

10. To present for payment any checks, money orders, and other forms of payment made payable to Defendants, which are the proceeds of the Assets, and to endorse same and collect the proceeds thereof.

11. To prepare and execute all documents and perform all acts in the name of the Defendants or any of them or in the Receiver's own name, which are necessary or incidental to preserving, protecting, managing, and controlling the Assets or which are necessary or incidental to carrying out the powers granted herein; and

12. To take such other actions as may be necessary or incidental to the foregoing specific powers, directions, and general authorities relating to the Assets or the Partnership.

C. The Defendants and their officers, directors, agents, custodians, and employees are ordered to:

1. Turn over to the Receiver the possession, custody, and control over the Assets and all records related to the Assets and Partnership business, including, without limitation, Defendants' records, books of account, ledgers, and all business records thereof, wherever located and however maintained (including, without limitation, information contained on computers and any and all software relating thereto, including loan servicing software, as well as all banking records, statements, and cancelled checks);

2. Turn over to the Receiver all documents which are or pertain to the Assets or the Partnership, including, but not limited to, all licenses, permits, or governmental approvals relating to the Assets or the Partnership;

3. Turn over all records of Eden Pointe that relate to tax filings by or on behalf of Eden Pointe, including filings and records related to low income housing tax credits;

4. Turn over to the Receiver all documents which are or pertain to insurance policies, whether currently in effect or lapsed, which relate to the Assets or the Partnership;

5. Turn over to the Receiver all contracts, leases, subleases, management agreements, employment agreements, licenses, assignments or other agreements of any kind whatsoever, whether currently in effect or lapsed, which relate to any of the Assets or the Partnership; and

6. Otherwise cooperate fully with the Receiver in the performance of the Receiver's duties, including assisting and cooperating with any effort by the Receiver to obtain records from third parties, including accountants, attorneys or other representatives that have performed services for or on behalf of Eden Pointe.

D. Defendants and their officers, directors, agents, custodians, and employees are prohibited from:

1. Interfering with the Receiver, directly or indirectly, in the management and operation of the Assets or Partnership, or otherwise directly or indirectly taking any action or causing any action to be taken which would dissipate or negatively affect the Assets or the Partnership;

2. Expending, disbursing, transferring, assigning, selling, conveying, devising, pledging, mortgaging, creating a security interest in, or otherwise disposing of any of the Assets.

- E. The Receiver shall provide all general and limited partners of Eden Pointe with access to the records of Eden Pointe that they are entitled to access under the Partnership Agreement and/or Tennessee law and otherwise comply with the Partnership Agreement and/or RULPA as adopted in Tennessee as it relates to access to Eden Pointe records.
- F. The Receiver and his employees, agents and attorneys shall have no personal liability and no claim shall be asserted against them relating to the Receiver's duties under this Order, except for claims due to their material failure to comply with this Court's orders. The Receiver shall not be liable for any contract, lease, claim, obligation, liability, cost or expense of Eden Pointe arising out of or related to events occurring prior to this Order.
- G. The Receiver will further be required to do the following:
1. To the extent feasible, the Receiver shall file in this action, within sixty (60) days after entry of this Order, an inventory of all property which the Receiver shall have taken into its possession pursuant to such Order, and every sixty (60) days thereafter, the Receiver shall (a) provide a balance sheet of assets and liabilities of Eden Pointe as of the reporting date; (b) itemize income and expenses of Eden Pointe for that reporting period; and (c) include a summary of activities of the Receiver during that reporting period.
 2. Apply to this Court for payment of the Receiver's fees and expenses and for approval of the retention of any professionals who will be paid more than \$1000.00 during the pendency of the Receivership ("Extraordinary Fees and Expenses"). The Receiver shall be compensated at an hourly rate set by motion, plus reasonable and

necessary out-of-pocket costs and expenses. The parties shall have the opportunity to object to any compensation or expense reimbursements paid to the Receiver after reported to the Court. The Receiver will be compensated from the Shelby County Funds or any other funds held by the Receiver.

3. Because the tax filings are of interest to all partners and may require some specialized knowledge regarding low income tax credits, the Receiver shall be required to obtain either Court approval or written consent from counsel for GEP and Plaintiffs prior to the retention of any professionals with respect to the preparation of any tax returns.

4. The Receiver will comply with Sections 9.7(g) and 9.6(a) of the Partnership Agreement with respect to providing the partners a draft copy of any tax returns in advance of filing and obtain the consent of the Special Limited Partner with respect to any such filing.

- H. Any provision of this Order requiring the Receiver to obtain approval before proceeding with any action or expenditure shall be deemed to be satisfied by an Order of this Court entered after notice to the parties, with said approval being obtained either before or after the occurrence of such action or expenditure.
- I. Upon the failure of any parties in possession of Eden Pointe, L.P.'s assets, their agents, representatives and all persons acting under, in concert with, or for them, to abide by any term or condition of this Order, the Receiver may petition the Court for further action to compel and enforce this Order.
- J. The Receiver shall otherwise have and enjoy the powers and prerogatives ordinarily provided to receivers by law. The Receiver may at any time apply to this Court for

further or other instructions and powers necessary to enable the Receiver to properly perform the Receiver's duties.

K. Any of the above-stated provisions may be modified by order of this Court.

L. All other matters are reserved.

It is so ORDERED.



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BUSINESS COURT DOCKET
PILOT PROJECT

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